TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 236.

EDWARD H. LOVE, PLAINTIFF IN ERROR,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED MARCH 23, 1906.

(20,147.)

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a In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Appellant,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Respondents.

Transcript on Appeal from the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula.

1 In the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula.

EDWARD H. LOVE, Plaintiff,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants.

Edward H. Love, plaintiff in the above entitled action, complains of the defendants therein, and for cause shows unto this Hon. Court:

That at all the dates and times hereinafter mentioned he was and now is a citizen and resident of the County of Missoula, and State of Montana, and a citizen of the United States of America, and as such in every respect duly and lawfully entitled and qualified to settle upon, occupy and improve a homestead upon the public domain of the said United States, and to enter the same and obtain and receive a United States patent therefor under and in pursuance of the laws of the said United States, and that one Michael Flahive was up to the time of his decease hereinafter stated likewise a citizen of the said United States and as such in all respects duly and lawfully entitled and qualified to settle upon, occupy and improve a homestead upon the public domain of the said United States, and to enter the same and obtain and receive a patent therefor, and that the said defendant, Annie Flahive, up to the time of the decease of the said Michael Flahive was his wife, and ever since said time hath been and now is the widow of said deceased.

II.

That in the month of May, 1882, this plaintiff settled upon, occupied and improved the East half of the Southeast quarter of Section Twenty-two (22), and the East half of the Northeast quarter of Section Twenty-seven (27), Township Twenty (20) North,
2 of Range -six (26) West, in the County of Missoula, then Territory now State of Montana, being contiguous legal subdivisions one mile long and one-quarter of a mile wide, for the purpose in *good faith* of entering the same and obtaining a United States patent therefor as a homestead; that said land was at the time unsurveyed public lands of the said United States, and continued so to be up to the date hereinafter mentioned, and as such subject to settlement, occupancy and improvement as aforesaid; and that this plain-

tiff in the year aforesaid, as he of right might and could do, erected a dwelling house thereon, and built a good and substantial fence around said land enclosing the same, with the exception of the north twenty acres thereof, and continuously occupied, possessed and improved the same up to the date hereinafter stated.

III.

That in the year 1888, said land was duly surveyed, and on the 11th day of December of said year, the plat of the survey of the Township in which the same is situated, duly and properly returned, approved and filed in the local land office at Helena City, Montana, being the district then comprising said land; that on the second day of January, 1889, and within the time required by law therefor, this plaintiff for the purposes hereinbefore stated duly made and executed the necessary affidavit and application to enter said land and obtain a patent therefor, and with that intention delivered the same to the officers of said local land office; that said application was rejected as to all that portion of said land lying in said Section Twenty-seven, on account of the claim thereto of the Northern Pacific Railroad Company under its grant from the said United States; and that this plaintiff duly appealed from said decision to the Hon. Commissioner of the General Land Office, and the claim of said Company was upon said appeal rejected, and said plaintiff's application sustained, which said decision is still in full force and effect.

3 IV.

That on the 14th day of June, 1889, and after said plaintiff had so deposited said affidavit as aforesaid, and for the purposes aforesaid, the said Michael Flahive during his lifetime filed with said local officers his affidavit and application, in due form of law, to enter as a homestead the Southeast quarter of Section Twenty-two, which embraced and included the said East half of the Southeast quarter of the land so sought to be entered by plaintiff as aforesaid, being the north eighty acres of said tract and comprising the sixty acres so possessed, occupied and fenced by this plaintiff as hereinbefore stated; that the officers of said land department found as a fact that the application of plaintiff and the said Michael Flahive now deceased were filed simultaneously on the said 14th day of June, 1889, and treated and considered the application of plaintiff as having been made at said date and not before, all of which will more fully appear by reference to the exhibits hereinafter mentioned.

V.

That during the proceedings had in said Land Department, and while said contest was still pending therein, the said Michael Flahive died, and thereafter the same was continued by the said Annie Flahive as the widow of said deceased; that such proceedings were had and done in said Land Department as that the application of plaintiff was finally erroneously rejected and the application of said de-

ceased sustained, and the said defendant, Annie Flahive, as the widow of said deceased, erroneously allowed and permitted to enter the said East half of the Southeast quarter of Section Twenty-two (22); Township Twenty (20) North, of Range Twenty-six (26) West, so settled upon, possessed and improved by plaintiff as aforesaid, and on the — day of December, 1899, issued to said defendant, Annie Flahive, a United States patent therefor, all of which plaintiff is informed and believes, and therefore alleges, was done and
4 caused to be done under a mistaken construction of the acts of congress applicable thereto, entitled "Pre-emption and Homestead, and the acts amendatory and supplemental thereto, and said land wrongfully and erroneously taken from plaintiff who in equity and good conscience was and still is entitled to the same, and wrongfully and erroneously awarded and granted to said defendant, Annie Flahive, who ever since has held and now holds the legal title thereto.

VI.

And for the purpose of showing to this Hon. Court the mistake and errors aforesaid, said plaintiff alleges that on the 14th day of August, 1890, in said local land office at Helena a hearing of said applications was had and an opinion rendered awarding to plaintiff the land in controversy as aforesaid; that said Michael Flahive appealed therefrom to the Hon. Commissioner of the general Land Office, and on July 26, 1892, the decision of said local officers was by him affirmed; that said Michael Flahive again appealed from the decision of said Commissioner to the Hon. Secretary of the Interior, and on the 12th day of January, 1894, said decision was duly affirmed; that on January 30, 1895, a motion was made by said defendant, Annie Flahive, as widow of said Michael Flahive, for a rehearing, based *solely* upon the alleged ground, "That Love had parted with any title and interest in the land in controversy by a sale of said premises to one Rundall, who had in turn sold to Flahive;" that said rehearing was granted upon said question alone, and upon said rehearing said local officers at Helena, Montana, on the 4th day of June, 1895, again decided in favor of this plaintiff and recommended that the original decision be adhered to; that said defendant, Annie Flahive, appealed therefrom again to the Hon. Commissioner of the General Land Officer, and on the 9th day of December, 1895, said decision of the local officers was again affirmed; that on the
5 20th day of March, 1895, said Commissioner, upon a motion for review, vacated the former decision upon the sole and only ground of the estoppel therein mentioned, which said decision was affirmed by the Hon. Secretary of the Interior on the 26th day of December, 1896, upon the grounds of said estoppel, and none other; that the findings of fact and conclusions of law, except in respect to said estoppel alone, awarded and granted the application of plaintiff, and in all other matters, facts and respects found him entitled to said land; a copy of which said findings are hereto attached, marked exhibits A, B and C, and made a part of this complaint, to which reference is made.

VII.

And plaintiff further shows unto this Hon. Court, that, inasmuch as it appears and is a fact that plaintiff was entitled to enter and obtain a patent for said land in controversy, but for the estoppel in said decision mentioned, plaintiff alleges that in that behalf the officers of said Land Department committed error and mistake in construing the said Acts of Congress, on account of which plaintiff was wrongfully and erroneously deprived of said land, and for the purpose of showing to the Court here more specifically and particularly said mistakes, and errors, plaintiff, on his information and belief, alleges:

That said officers of the Land Department erred in considering the fact as to whether the sale in said decisions mentioned was of said land in controversy or logs and in considering the application of plaintiff of April 5th, 1889, as immaterial, and in not finding upon said question; the officers of said Land Department erred in holding that whether said plaintiff sold said land or said logs, that is was conclusive evidences that said plaintiff at *that time,* in 1883, did not claim said land, and was estopped from thereafter claiming the same, and especially in holding that he was estopped on that ac-
6 count from claiming said land under his filing an application of June 14th, 1889, after said Michael Flahive had forfeited his claim to the same by a failure to file upon the same within three months from the approval and filing of said Township plats; that it was mistake and error in holding that said application of plaintiff after said forfeiture was unavailable and defeated by said estoppel, and that said estoppel tolled the neglect and failure of said Michael Flahive to make his application and filing within the time required by law; that the facts found do not constitute an estoppel in that there is no finding that said Flahive did any act or thing he would not have done to his injury or otherwise; that there is a manifest error and mistake in law in not holding that said Flahive forfeited all the rights he had including all rights under said estoppel or disclaimer, if any, by a failure to make his said filing and application within three months after the approval and filing of said plats; that there was manifest mistake and error in law in not holding under said findings that said land was subject to entry by plaintiff upon his said application and filing, and that said land passed to him under Section 2265, 2266 and 2274, of the Revised Statutes of the United States, and Section 3, of the Act of May 14, 1880, U. S. Revised Statutes, Vol. 21, page 140; and in not holding that said Flahive had forfeited all priority, right and claim to said land on account of the forfeiture aforesaid, under the preemption and homestead laws of the United States and laws supplemental and amendatory thereto; and plaintiff especially charges and alleges, that in holding as matter of law, that said disclaimer or estoppel was available to said Flahive who assisted in the building of said fence, or that it was intended to shut out any subsequent claim of plaintiff, either before or after said forfeiture, is unreasonable, inequitable and unjust to this plaintiff; and that the holding, as matter of law, by the

officers of the land department that said estoppel or disclaimer
7 excluded plaintiff of the right to reassert his said claim after such forfeiture and operated to defeat said forfeiture, was contrary to public policy and in direct conflict with the express provisions of the statutes aforesaid, and that there was manifest error under the facts found in not holding the alleged estoppel or disclaimer void and inoperative, that the said — by said Rundall to said Flahive, who purchased with a knowledge of a re-asserted claim by plaintiff, operated as a forfeiture, and abandonment by said Rundall and let in the re-asserted claim of plaintiff as a superior right and equity against said Flahive.

VIII.

That the right, title and priority of this plaintiff and said defendant, Annie Flahive, depend entirely upon the construction and interpretation of the United States Statutes aforesaid; that by reason of the mistake and error of the officers of said Land Department in the construction and interpretation thereof and applying the same to the facts so found as aforesaid, said land in controversy, and especially the sixty acres thereof so enclosed and occupied by this plaintiff as aforesaid, and to which he was and is in equity and good conscience entitled, and which should have been adjudged and awarded to him, was taken from said plaintiff and wrongfully and erroneously adjudged and awarded to said defendant, Annie Flahive, and said patent so wrongfully and erroneously issued, to her as aforesaid on account whereof she has and holds the legal title to said land in trust for this plaintiff as hereinbefore stated; that plaintiff is not advised or informed as to the necessary and proper amount of cost incurred in obtaining said patent and which ought or should be chargeable to this plaintiff, and that he is willing and tenders the same into Court upon such amount being ascertained; that no action of ejectment or other action has been commenced against this plaintiff to recover possession of said premises on account of said patent or otherwise, nothwithstanding his actual
8 possession as aforesaid since 1882; that immediately after the issuance of said patent the plaintiff corresponded with his attorneys at Washington City, D. C., who had charge of said proceedings in his behalf in the said land office, as to the propriety of commencing this action, and that soon thereafter he retained his present attorneys to commence the same; that no material or substantial change had occurred in respect to said premises, and that he has diligently prosecuted his said claim and equities, and verily believes he is entitled to the relief hereinaftr demanded; and the said plaintiff claims and asserts his title and right under the United States Statutes aforesaid.

IX.

And plaintiff also further alleges and shows unto this Hon. Court: That on the 22nd day of January, 1900, the said defendant, Annie Flahive, made and executed a mortgage to the said defendant, Andrew J. Lansing, for the sum of seven hundred dollars, upon the Southeast quarter of Section Twenty-two, Township Twenty North,

of Range Twenty-six West, which said mortgage includes the eighty acres in controversy; that the said eighty acres outside of the land in controversy and included in said mortgage, is more than sufficient to pay off the balance, if any, due upon the same; that said mortgage, as plaintiff is informed and believes, and therefore alleges, was taken with full notice of the claim and equities of plaintiff, and includes the sixty acres so possessed and fenced by him, as in his said complaint set forth, and that all said mortgage with the exception of a small amount to-wit, about the sum of two hundred dollars, has been paid by the said defendant, Annie Flahive, and that the exact amount remaining due upon the same, if anything, is unknown to this plaintiff.

Wherefore, Plaintiff prays that the said defendant, Annie
9 Flahive, be adjudged and decreed to hold the legal title to said premises obtained by said patent as the trustee of this plaintiff, and that she be compelled and required to execute a good and sufficient deed of conveyance of said title to this plaintiff, and that in the event she fails so to do, that some suitable person be appointed by this Hon. Court to make and execute the same within such time as shall be deemed reasonable.

That the amount of the indebtedness to the said defendant, Andrew J. Lansing, be ascertained and determined, and that by a decree of this court that portion of the land not in controversy be first sold to satisfy the same, or that this plaintiff be permitted to take up the said mortgage; and that plaintiff have such other or further relief as to this Hon. Court may seem just and equitable, and that he recover his costs and disbursements in this behalf expended.

TOOLE & BACH,
Attorneys for Plaintiff.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

Edwin Warren Toole, being duly sworn, deposes and says: that he is one of the attorneys for the Plaintiff in the above entitled cause; that said plaintiff is absent from the State of Montana and County of Lewis and Clarke, wherein affiant and each of plaintiff's attorneys reside, and for which reason affiant makes this verification; that affiant has read the foregoing complaint, and knows the contents thereof; and that the matters therein stated are true to the best of his knowledge, information and belief.

EDWIN WARREN TOOLE.

Subscribed and sworn to before me this Thirtieth day of November, A. D. 1900.

HARRY HARRIS,
Notary Public in and for Lewis and Clarke County, State of Montana.
[SEAL.]

10 EXHIBIT A.

Findings of Fact of the Commissioner of July 26, 1892, and Affirmed on Appeal by the Secretary of the Interior on February 12, 1894.

With regard to the contest between Edward Love and Michael Flahive, involving the E. ½ of S. E. ¼ of Sec. 22, Town 20 N. R. 26 W., the testimony shows that Love settled and built a house on the N. E. ¼ of N. E. ¼ of Section 27, same township and range, in May, 1882; he claimed one mile in length and one fourth of a mile in width. He fenced the tract in Section 27, and the South forty and one half of the north forty in E. ½ of S. E. ¼ of Section 22; Flahive worked for him and built the fence. Love did not fence the remainder of the north forty for the reason that he was not able to at that time. Flahive did not claim any portion of the land. In 1886 Love attempted to enclose the residue of the north forty, but was prevented by demonstrations of violence by Flahive who had built a house on the N. W. ¼ of S. E. ¼ of said Section 22 in October, 1884, and claimed the whole of said S. E. ¼ by virtue of a purchase from one Jim Reynolds, who, he alleged, had purchased from Edward Love.

This alleged purchase is unsupported by any other testimony, and is denied by Love. The fact of an alleged sale by Love to Rundells is an acknowledgement of Love's claim.

It would appear that at the time he initiated his claim in May, 1882, he was entitled to 160 acres as against the government; that he went to work at once and built him a house, and enclosed the whole of the land claimed by him so far as he was able to at that time, with the exception of N. ½ of the north forty; that Flahive himself worked for Love upon the fence that enclosed the land mentioned without making any claim whatever for any portion of it.

After survey in 1886 when Love attempted to complete his fencing for the north half of the north forty Flahive made threats of violence against him, he, Flahive, having in 1885, cultivated
11 one or two acres of the land on the said forty outside of Love's enclosure.

The fact that Love's house was not situated in any portion of the land in controversy is of no moment, for in making his claim as evidenced by his fencing Love intended to include the four forties north and south, that is an aggregate body belonging together, and are not to be separated and Love's house being built upon any one forty is considered as constructed upon and belonging with the whole of the land to the extent of 160 acres.

It is evident from the testimony that Flahive has no right whatever to any portion of the E. ½ of S. E. ¼ of Section 22, T. 20 N. R. 26 W., as against the claim of Love; his application to make homestead entry is accordingly rejected to the extent of the said tract subject to appeal within sixty days.

This decision was affirmed on appeal by the Secretary of the

Interior on February 12, 1894, the Secretary declaring specifically that he found no error therein.

EXHIBIT B.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 15, 1897.

LOVE
vs.
FLAHIVE.

Motion for Review.

The Commissioner of the General Land Office.

SIR: This case involves the E. ½ of the S. E. ¼ of Section 22 T. 20 N. R. 26 W., Missoula, formerly the Helena land district, Montana, and is before the department upon motion for review of departmental decision of December 26, 1896, by Edward H. Love; said decision having awarded the tract to Annie Flahive, widow of Michael Flahive.

The motion for review is upon the ground that the decision made by the department erred in holding that the application of
12 Love and Flahive were simultaneously made, to-wit, June 14, 1889, and not holding that the application of Love was made on April 5, 1889.

Upon this point the decision under review says:

Before coming to a discussion of the evidence it is well to consider a contention of counsel for the plaintiff upon another phase of the case. It appears that on January 2, 1889, Love executed the necessary papers to enter the land he seeks as a homestead.

January 16, 1889, Flahive executed his papers to enter the S. E. ¼ of Sec. 22. It does not appear when Love's application was received by the local officers, nor is there any notation of filing upon the application of Flahive.

This land became subject to entry on the 11th day of December, 1888, and it is asserted by counsel that on April 5, 1889, Love's application was rejected, showing that it must have been filed prior to that time. However this may be, the local officers declare the two applications simultaneous, and fixed the 14th day of June as the day of filing. Considering that no notation appears of the actual date of filing the fact that the local officers held them to be simultaneously, the absence of protest upon the part of the plaintiff to such holding by the local officers, until the present time, and the further consideration that this hearing was ordered for the sole purpose of determining the issue set forth in departmental decision of January 30, 1895, the protest now entered by counsel for Love will not be entertained.

In support of the assertion made by counsel for the petitioner it is

said that the application of Love has the following endorsements upon it:

Received April 5, 1889, and rejected as to the E. ½ of the N. E. ¼ of Sec. 27, T. 20 N. R. 26 W., because the same is within the forty mile limits of the grant to the Northern Pacific Rail-
13 road Company, the withdrawal for the benefit of which took effect February 21, 1872; notice given (name illegible), attorney, personally, and thirty days allowed for appeal.

(Signed) S. W. LANGHORN, *Register.*

And counsel further asserts that by letter "H" of February 18, 1892, your office directed the local officers at Missoula to "forward the application of the parties filed June 14, 1889; also the application of the plaintiff, filed April 5, 1889, to enter, in part, the tract below described" (describing the land in question); and that on April 9, 1892, the said local officers replied stating that "the docket gives date of filing as noted in the copy of the Honorable Commissioner's Letter."

It is therefore urged that the record not only shows that the application of Edward H. Love was made on April 5, 1889, but that, though there was no notation upon the application of Flahive, from the last letter *(supra)* of the local officers, it appears that such application was in fact made on June 14, 1889.

It has not been deemed necessary to verify these contentions of counsel. Assuming them to be true, and that the application of Love was in fact made April 5, 1889, and that the application of Flahive was made subsequently thereto, to-wit, on June 14, 1889, there does not appear to be any sufficient reason for disturbing the decision hereinbefore made in this cause. That decision was made upon the ground that the sale by Love to Rundall therein referred to, operated as an estoppel to the assertion of claim by Love to the tract upon which were situated the Finley logs.

And that being true, the fact that his application was made prior to that of Flahive could not inure to his advantage. If he were estopped from asserting rights under the application simultaneously made with that of Flahive, he was unquestionable estopped from asserting rights under an application made two months previous.

The motion for review is denied, and the former decision
14 of the Department is adhered to.

Herewith are returned the papers in the case.

Very respectfully, C. N. BLISS, *Secretary.*

EXHIBIT C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 26, 1896.

LOVE
vs.
FLAHIVE.

The Commissioner of the General Land Office.

SIR: This case involves the E. ½ of the S. E. ¼ of Section 22, T. 20 N. R. 26 W., Missoula, formerly Helena, Montana, land district.

The record shows that in the decision of the local officers of August 28, 1890, in the Helena Land District, it was held that the Homestead application of Edward H. Love and Michael Flahive were simultaneous, to-wit, on June 14, 1889.

The application of Love was for the E. ½ of the N. E. ¼ of Sec. 27, and the E. ½ of the S. E. ¼ of Section 22. That of Flahive was for the S. E. ¼ of Sec. 22. The two applications therefore conflicted as to the eighty acre tract in controversy.

A hearing was ordered August 14, 1889, and on August 28, 1890, an opinion was rendered recommending that Love be allowed to enter the land in controversy. Upon appeal your office decision of July 26, 1892, affirmed the action of the local officers, and on January 12, 1894, that action was affirmed by the Department (281 L. & R. 74). Subsequently, on January 30, 1895, this Department considered a motion for rehearing of said departmental decision, filed by Annie Flahive, widow; it being alleged that Love had parted with any title or interest in and to the land in controversy by a sale of the said premises to one Rundall, who has in turn sold to Flahive; and Secretary Smith said:

There can be no question that the sale herein spoken of conveyed no title. Love had no title to convey to Rundall, and Rundalls had none to convey to the defendant, but the evidence herein set forth, if true, would show that if Love had a *bona fide* settlement upon his tract of land, he had renounced all claim to it by his sale to Rundalls.

I am convinced that justice can be best subserved by remanding this case to the local officers for the purpose of a hearing of the question thus raised, and at this hearing the local officers will confine the testimony to the evidence introduced and that in contravention of the alleged sale of Love to Rundalls.

March 29, 1895, this second hearing was had, and on June 4, 1895, the local officers rendered their decision recommending that the original decision of the Department be adhered to and the land awarded to Love. Upon appeal your office decision of December 9, 1895, affirming the findings of the local officers. A motion for review of that decision having been made on March 20, 1896, a decision was rendered vacating the former judgment, reversing the action

of the local officers, and holding that the application of Love should be held subject to the rights of Flahive. Appeal by Love brings this cause to the Department.

Owing to the confused nature of the evidence and the different decisions heretofore rendered in the case at bar, it is deemed not inappropriate to give a short synopsis of the testimony.

The witness THOMAS:

In the year 1885 he spoke to Love about purchasing the Rundall claim, and that Love told him there was no necessity of buying Rundall's claim, as there was land north of his (Love's) house which could be taken. This land was in Section 22. It was the land in contest. Flahive was then living upon the Southwest quarter of what proved to be the N. E. ¼ of Sec. 22; the same place that he is living now. That the witness spoke to Rundall about buying his claim; that Rundall asked $500. Witness told him (Rundall) that he (the witness) could take land and showed him where it was; that Rundall said "That land is not vacant; I bought that land and let Flahive have it to get him out of the house," (Meaning a house on the Rundall claim). He said that he had bought it from Love. Witness subsequently bought out Rundall. In 1883 there were some logs there that belonged to Finley; the logs were on the southwest side of the northeast forty—that is, the north forty of the land in dispute. Witness was present at a conversation that occurred between Flahive and Love in 1886. Love was repairing a fence; they were quarreling and Flahive wanted Rundall to tell Love that he (Rundall) had bought the place of him (Love). Rundall did so, and told him that he had paid him $20 for it. Love answered, "He told him he had sold out and left there and it was none of his fight." Rundall, Flahive, Love, Ross and witness were present. The fence was on the north forty of the land in dispute.

Cross-examination:

There were some improvements there in 1885 that belonged to Love. The improvements were fencing.

The witness HURLBURT:

There was an unfinished cabin upon the land in dispute in 1883.

ADEN C. VANDERPOOL:

He, with Ross and Lynch, went to see Love at his house; Love said he had a claim for sale that belonged to a friend; it was the land in dispute. He offered it for $70. The land was not surveyed. He did not buy. Subsequently, "Love told me that Rundall was going to jump this claim, and fearing that he would jump it he accepted twenty dollars."

Cross-examination:

This conversation about buying the land was in August, 1883. Love was not occupying this land. Love's friend had some logs on

the land. Did not hear Love say that he had some logs to sell. The logs were on the claim and the claim was for sale.

17 NEPTUNE LYNCH, SR.:

Was present at the conversation between Vanderpool and Love in 1883. Vanderpool, Love, Ross and witness were present. Love said he had two claims, one was for sale and belonged to Finley. He asked $75. Vanderpool did not purchase. Subsequently Love showed him a twenty dollar gold piece and said Rundall had paid him that for the land. Rundall and Flahive were in partnership; they dissolved, and he, at Flahive's request, drew up a bill of sale from Rundall to him for this tract of land, which Rundall had purchased from Love.

Cross-examination:

Love had improvements on both tracts. On the land he was trying to sell there was a partly built cabin.

JAMES RUNDALL:

In the fall of 1883 "I bought a piece of land of him (Love) that he claimed as the Finley claim, lying north of the one he resides on now; I paid him 20 dollars for the piece of land; this claim I bought adjoins the one he lives on at present; he claimed the one he lives on at present was railroad land; and the Finley claim would be government land; the land was not surveyed." There was a log cabin five or six logs high upon the tract in controversy. Rundell and Flahive were partners, and the next fall they dissolved partnership and Flahive went to live where his family is now residing. The land in dispute was included in the purchase from Love. Witness was present at the conversation between Love and Flahive. Flahive forbade his working on the land. Witness told Love that the land had been sold to him. "I think he said it was none of my business or none of my fight."

Cross-examination:

Love sold Finley's claim; paid him $20 for the land and the logs. The land was not claimed by Love. The house built by witness after survey proved to be upon another quarter section, though he had intended to build upon the land that he had purchased from
18 Love. It was only forty rods from his house to the line.

On Behalf of Love.

HUGH MONNAHAN:

Love claimed the land in dispute in 1883. Rundall bought some logs of Love and moved them to Maher's place. Part of the land in dispute was enclosed by Love. The logs were upon the land now owned by Thomas, up the southeast quarter of the latter's claim. Rundall built on the N. E. ¼ of Sec. 22; that is the Thomas claim now.

JAMES S. MERRITT:

Love settled upon this land in 1882. Witness saw the logs; they were situated, to the best of his recollection, not on the land in dispute. "I think near where Mrs. Flahive's house is; on the west half of the S. E. ¼ of Sec. 22." Rundall's house was near the center of the N. E. ¼ of Sec. 22. From the way that Love fenced it looked as if he claimed a quarter of a mile wide and a mile long.

Witness COMBEST:

Testified to nothing pertaining to the case.

The witness GIBBS:

Was present at the conversation between Love and Flahive. Does not recollect that Rundall took any part in the conversation.

EDWARD H. LOVE:

Did not sell any land to Rundall. "On the 11th of September, 1883, I was building a house for a man by the name of Maher, and there was some logs on a claim there which belonged to one W. H. Finley; Mr. Rundall told me (he) had a notion of taking that claim; he had seen no one on it, as he claimed he was watching it close; he asked me who owned those logs; I told him it was W. H. Finley. He asked me where he was; I told him he was keeping a saloon at Heron Siding, and he could write to him about those logs.

He asked me if I wouldn't write to him, as I was acquainted
19 with Finley, to know what he would take for the logs. I told him I would do so, and the reply came from Mr. Finley to tell this man that he would take $70 for the logs. He told me he could go to grass with his logs, and (he) would take the claim anyway as it was vacant. He said he would give $20 for the logs and said he would give me the money. If not he would go on the claim anyway. The next day he put the logs on his wagon and hauled them down to Mr. Maher's house and put them in a cellar that he was digging for that man at that time. That is the whole history of the logs. Those logs were on what is now called the Bud Thomas Claim." Nothing was said about witness claiming the land for himself or for Finley. Did not claim the land upon which the logs were situated.

(A diary was offered in evidence by the witness.)

Had the land marked with stakes in 1882; these stakes were set a mile apart in length and a quarter of a mile in width.

LYNCH (in rebuttal):

Finley cabin was on the N. E. ¼ of the S. E. ¼ of Sec. 22, on the north forty of the land in dispute; between a quarter and a half a mile from Love's.

The exhibit "B" which was a diary of Love's and is introduced for the purpose of showing that the transaction had a reference to logs and not to the land; the entries referred to being found on pages

58 and 59. On page 58, under date of Tuesday, September 11th, the following entry is made: "Wrote to W. H. Finley about his logs for J. Rundall." Under date of September 14th, on page 59, the following appears: "James Rundall paid me $20 for W. H. Finley's logs. Debtor to W. H. Finley for $20 from James Rundall."

* * * * * * *

Before coming to a discussion of the evidence it is well to consider a contention of counsel for the plaintiff upon another phase of the case. It appears that on January 2, 1889, Love executed the necessary papers to enter the land he seeks as a homestead.
20 January 16, 1889, Flahive executed his papers to enter the S. E. ¼ of Sec. 22. It does not appear when Love's application was received by the local officers, nor is there any notation of filing upon the application of Flahive.

This land became subject to entry on the 11th day of December, 1888, and it is asserted by counsel that on April 5, 1889, Love's application was rejected; showing that it must have been filed prior to that time. However this may be, the local officers declare the two applications simultaneous, and fixed the 14th day of June as the date of filing. Considering that no notation appears of the actual date of the filing, the fact that the local officers held them to be simultaneous, the absence of protest upon the part of the plaintiff to such holding by the local officers, until the present time, and the further consideration that this hearing was ordered for the sole purpose of determining the issue set forth in departmental decision of January 30, 1895, the protest now entered by counsel for Love will not be entertained.

Much of the testimony, as shown by the synopsis, is incompetent and irrelevant, and great difficulty has been met with in determining the question presented by the record.

The witnesses Vanderpool and Lynch testify that Love had a place for sale which included the tract in controversy; Rundall that he purchased the tract in controversy from Love. The latter denies any sale of the land, but states that he sold some logs for W. H. Finley. It is evident from Love's statement of the transaction that, conceding the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. F. Finley, upon which the logs were situated, was about to be taken by Rundall. So the inquiry can be narrowed down to the position of these logs. On Flahive's part, Thomas, Vander-
21 pool, Lynch, Rundall, C. Lynch and Hurlbut state that these logs were on the land in dispute. Monnahan, for Love, locates them north of the land in dispute and upon the Thomas claim; Merritt, for the same party, says they were on the S. E. ¼ of Sec. 22, but near Mrs. Flahive's house; which would place them on the land included in Flahive's application, but outside of the limits of the land in contest; and Love testifies that they were upon the Thomas claim. So it appears that a clear preponderance

of the testimony shows that the logs were situated upon the land in controversy; and from Love's evidence it is shown that he at the time of this sale laid no claim to the land upon which this unfinished cabin was erected.

Further, Thomas and Rundall state that in the controversy between Flahive and Love over the repairing of a fence, Rundall told Love that he had bought this land from him and that Love replied that it "was not his fight." This was the assertion of the sale in the presence of the vendor, and there was no denial.

Vanderpool and Lynch testify that Love had some land for sale, and not logs, and that the land for sale was the land in controversy.

Love introduced his diary to substantiate his testimony that the transaction between himself and Rundall had reference solely to the logs; but an inspection of the entries upon which he relies, as found upon pages 58 and 59, shows them to be interlineations, and apparently, from an examination of the diary, an attempt to manufacture evidence to corroborate his testimony.

It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case Love asserted no title. It matters not, under the peculiar circumstances of this case, whether Love sold his own land or the land of W. H. Finley or simply logs; as in
22 the first instance it would work an estoppel of the assertion of claim now, in the second it would be conclusive evidence that the land was not claimed by him, and in the third it would be equally evidence of the same fact, as from his own testimony it appears that he laid no claim to the land upon which the logs were situated.

This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive, did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted, at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith, estopped from asserting title against the vendee of the purchaser from him.

The decision appealed from is therefore affirmed and the application of Love to enter the tract in controversy is held subject to the rights of Annie Flahive, the widow of Michael Flahive.

Herewith are returned the papers in the case.

Very respectfully, DAVID R. FRANCIS,
Secretary.

Filed Dec. 3, 1900.
JOHN L. SLOANE, *Clk,*
By THOS. E. EVANS, *Dep. Clerk.*

(Title of Court and Cause.)

Now comes the above-named defendants and demur to the complaint of plaintiff filed herein and as ground for demurrer, allege:—
That said complaint does not state facts sufficient to constitute a cause of action against defendants or either of them.

E. E. HERSHEY,
Attorney for Defendants.

Filed Dec. 22, 1900.
JOHN L. SLOANE, *Clerk,*
By R. W. KEMP, *Deputy.*

23 District Court Journal, Sixteenth Day, March Term, 1903, July 6th, 1903.

EDWARD H. LOVE
vs.
ANNIE FLAHIVE and ANDREW J. LANSING.

The demurrer to the Complaint taken under advisement Feb'y 8th 1902 is sustained and an exception is entered for the plaintiff.

(Title of Court and Cause.)

The Court on the 6th day of July, 1903, having by an order made on that day sustained the defendant's demurrer to the plaintiffs complaint in said action and no time being asked or granted, and more than five days having elapsed since said demurrer was sustained and no amended complaint having been filed therein; Now on motion of the defendants' attorneys, the default of the plaintiff for not filing an amended complaint in said action is hereby entered.

Attest, my hand, and the seal of said Court, this 15th day of September, 1903.

[SEAL.]

R. W. KEMP, *Clerk,*
By THOS. E. KEMP,
Deputy Clerk.

District Court Journal, Second Day, December Term, 1904. Dec. 6th, 1904.

(Title of Cause.)

Whereas, the court has heretofore on the 28th day of November, 1903, made an order directing judgment to be entered in favor of the defendants in this action upon the demurrer interposed by them, upon the payment of the legal fees therefor, and whereas said fees were paid on the 30th day of November, 1903, by Toole and Bach, attorneys for plaintiff.

Now, Thereupon, on the motion of Ira T. Wight, Esq., who appeared on behalf of Toole & Bach, attorneys for plaintiff.

24 It is ordered, adjudged and decreed that the said defendants have and recover judgment against the said plaintiff for costs of suit, and that plaintiff's said bill be, and the same is, hereby dismissed.

FREDERICK C. WEBSTER, *Judge.*

(Title of Court and Cause.)

Certificate to Judgment Roll.

I, the undersigned, Clerk of the District Court of the Fourth Judicial District of said State of Montana, in and for the County of Missoula, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in Judgment Book H. of said court at page 555. And I further certify, that the foregoing papers hereunto annexed, constitute the judgment roll in said action.

Witness my hand, and the seal of said District Court this 6th day of December, 1904.

[SEAL.]

R. W. KEMP, *Clerk,*
By THOS. E. KEMP,
Deputy Clerk.

(Title of Court and Cause.)

Notice of Appeal.

To the clerk of the said District Court, and to the above named defendants, and to Messrs. E. E. Hershey and Woody & Woody, their attorneys:

Please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of this State from the judgment therein made and entered in the said District Court on the 6th day of December, 1904, in favor of the defendant in said action and against the plaintiff, and from the whole thereof.

Dated February 18th, 1905.

TOOLE & BACH,
Attorneys for Plaintiff.

Filed February 21st, 1905.

R. W. KEMP, *Clerk,*
By THOS. E. KEMP, *Deputy.*

25 (Title of Court and Cause.)

Proof of Service.

Due and timely service of notice of appeal in the above entitled cause and receipt of a true copy thereof are hereby admitted and acknowledged this 21st day of February, 1905.

ELMER E. HERSHEY AND
WOODY & WOODY,
Attorneys for Defendants.

Office of the Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, *ss:*

I, R. W. Kemp, Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, do hereby certify that the foregoing is a full, true and correct copy of the Judgment Roll, Notice of Appeal and Proof of Service of Appeal, of the above entitled action and that an undertaking on appeal in said cause in due form has been properly filed in my office.

R. W. KEMP,
Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula.
[SEAL.]

Transcript filed in the Supreme Court of the State of Montana April 14, 1905.

26 *Order for Judgment.*

Minutes of Supreme Court, State of Montana.

Seventh Day of December Term.

MONDAY, *December 18th*, 1905.

Court convened pursuant to adjournment.
Present: The Hon. Theo. Brantly, Chief Justice.
" " Geo. R. Milburn, Associate Justice.
" " Wm. L. Holloway, " "
John T. Athey, Clerk.
M. N. Race, Marshal.
And the following proceedings were had, to-wit:

2194.

EDWARD H. LOVE, Pl'ff and App'l't,
vs.
ANNIE FLAHIVE ET AL., D'f'ts and Resp'ts.

This cause this day came on for the judgment and decision of the Court. Whereupon on consideration, it is now here ordered and adjudged by this Court, that the judgment of the Court below made and entered on the 6th day of December, A. D. 1904, be and the same is hereby affirmed at the cost of the appellant. Opinion by Mr. Chief Justice Brantly, Mr. J. Milburn and Mr. J. Holloway concurring.

Minutes of the day's proceeding signed by

THEO. BRANTLY.
GEO. R. MILBURN.
WM. L. HOLLOWAY.

27 *Opinion of the Court.*

No. 2194.

EWARD H. LOVE, Plaintiff and Appellant,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents.

Mr. Chief Justice BRANTLY delivered the opinion of the Court:

This action was brought to obtain a decree declaring the defendant Annie Flahive, trustee for the benefit of the plaintiff of the legal title to the east half of the south-east quarter of section 22, township 20, north of range 26 west, in Missoula county. The defendant Lansing is made a party because he appears of record as a holder of a mortgage upon the property from his co-defendant. The debt secured by this mortgage is alleged to have been paid, except a small balance. The district court sustained a general demurrer to the complaint, and, plaintiff declining to amend, entered judgment for the defendants. Plaintiff has appealed from the judgment.

The complaint is prolix and contains much matter that is immaterial. The pertinent facts, as they appear from its allegations and the exhibits attached to and made a part of it, are substantially as follows: In May, 1882, the plaintiff, being a citizen of the United States and qualified to acquire a homestead upon the public domain under the federal homestead laws, settled upon the east half of the north-east quarter of section 27, township 20, north of range 26 west, and built a house thereon. He claimed this land and also the land in controversy immediately to the north. He fenced it all except the north twenty acres of the disputed portion. One Michael Flahive, the husband of the defendant Annie Flahive, then worked for him and built the fence. The land had not been surveyed. In October, 1884, Michael Flahive made settlement on the north-

28 west quarter of the south-east quarter of section 22. He built a house thereon, and thereafter claimed the whole of that quarter of the section as his homestead. He was also qualified to acquire a homestead under the laws of the United States. He retained possession of the west half of the quarter section and also of the unfenced portion of the east half and cultivated it.

The official survey was made in 1886, but the plat was not approved and filed in the local land office until December 11, 1888. On January 2, 1889, the plaintiff executed the papers necessary to enter the land claimed by him. On January 16 Flahive executed the papers necessary to enter the south-east quarter of section 22. It does not appear distinctly from the allegations of the complaint when the applications were tendered to the officers of the local land office. However the fact may have been, in the subsequent controversy between the parties as to which of them was entitled to enter the land in dispute, these officers found and declared that the entries were tendered simultaneously, and by a decision made August 20, 1890,

fixed the date as June 14, 1889, and, inasmuch as the plaintiff appeared to have been the first settler, recognized his claim, permitted him to make the entry, and rejected Flahive's application as to the disputed portion. This decision was upon successive appeals to the commissioner of the general land office and the secretary of the interior, affirmed, the decision of the secretary of the interior being rendered on January 12, 1894.

In the meantime Flahive died. The defendant Annie Flahive, his widow, thereupon filed a motion for a rehearing, the ground alleged being that subsequent to his settlement in 1882, the plaintiff had, by a sale, parted with his interest in the portion of section 22 in controversy to one Rundall, who in turn had sold to Flahive, with the result that the plaintiff's right to entry was subject to that of
29 her husband Flahive. The rehearing was granted and the matter referred to the local officers for proof. Again the decision of these officers was in plaintiff's favor. Upon final appeal to the secretary of the interior this decision was reversed and the rights of the defendant Flahive held superior to those of the plaintiff. This decision was rendered on December 26, 1896. A motion for rehearing by the plaintiff, on the ground that the records of the local land office showed that his aplication for entry was in fact made prior to that of Flahive, and as early as April 5, 1889, was denied on March 15, 1897. Thereupon Flahive's entry was allowed and patent issued to Annie Flahive.

In making the decision of December 26, 1896, the secretary of the interior had before him evidence from which he found that subsequent to the date of plaintiff's entry in 1882, he had sold his interest, whatever it was, in the land in dispute to one Rundall, who in turn sold it to Flahive, and held that, such being the case and the two entries having been tendered simultaneously, the Flahive application should be given preference.

By the motion for rehearing by plaintiff, there was submitted the question whether, upon the records, the application for entry by the plaintiff had not in fact been made prior to June 14, 1889, and as early as April 5, 1889. It does not appear from the allegations of the complaint that such was the case; nor that the finding by the officers of the local land office that the entries were tendered simultaneously was erroneous. The decision of the secretary of the interior held in effect, that, since the entries were tendered simultaneously, it was of no consequence whether June 14 or April 5 was the correct date, that the result of the sale by the plaintiff was the same in either event, and that it operated as an estoppel against plaintiff's claims to preference.

30 The contention is made that the officers of the land department erred in holding that the fact that plaintiff's application for entry was tendered *bo* the officers of the local land office as early as April 5, 1889, was immaterial, since, if the application was in fact made at that time, he, being the first settler, had the preference. The further contention is made that if the applications were tendered simultaneously on June 14, 1889, the plaintiff was entitled to the preference, because, Flahive having failed to avail himself

of his preferential right during the three months following the approval of the survey and the receipt of the plat at the local land office (U. S. Rev. Stat., 2266; 21 Statutes at Large, p. 140, secs. 2 & 3), the right of plaintiff under his prior settlement became again superior, even if it be conceded he had lost it in the first instance by sale to Rundall subsequent to such settlement. In other words, let it be conceded that the sale operated as an estoppel to his assertion of a claim to preferential entry until the expiration of the time during which Flahive had the exclusive right,—that is until the expiration of the three months after the receipt of the plat at the local land office,—the plaintiff's old right revived and he should have been given preference, though the applications for entry were tendered simultaneously. It is said that in deciding both matters there was error in the application of the law to the facts, and plaintiff invokes the rule that whenever the officers of the land department of the United States have misconstrued the law involving the rights of entrymen, or have made a misapplication of it to the facts of the particular case, with the result that a patent has been issued to the wrong person, and thus an injustice is done to another who is of right entitled to it, a court of equity will hold the former a trustee for the latter and decree title accordingly. This rule is well settled.
31 (Small *v.* Rakestraw, 28 Mont. 413; Johnson *v.* Tousley, 13 Wall. 72.) But we think it has no application to this case.

In holding that it was not material whether the plaintiff's application to make entry was in fact tendered on April 5 or June 14, 1889, the secretary's decision was clearly right. By the decision of August 20, 1890, it was found by the local officers that the entries were tendered simultaneously. So far as the record shows, this finding was never questioned. Nor was the date of filing ever questioned until, by the motion for a rehearing, decided by the secretary on March 15, 1899, the secretary held that even if the local officers were mistaken in fixing June 14 as the date, the fact of simultaneous application still remained unquestioned, and that the difference in the date did not avail. If it be assumed that the finding of the local officers was erroneous as not being in accordance with the preponderance of the evidence, or that the decision of the secretary was wrong for the same reason, yet what the evidence before them was does not appear; and if it did, this court could not assume to review it and reach a different conclusion; for, in the absence of fraud, the findings of the officers of the land department upon all questions of fact are conclusive upon the courts. (Small *v.* Rakestraw, *supra,* and cases cited.)

Again. It is manifest that if the plaintiff after his settlement had sold his interest to Flahive, the latter had the exclusive right of entry until March 11, 1889. As between the two applications tendered before that date, Flahive was entitled to preference. If plaintiff's right had been sold or abandoned by him, it must follow that his settlement in 1882 could not be recognized as initiating any right of preference over Flahive, who had preserved his from the date of settlement in 1884. After the expiration of the three months from

December 11, 1888, the parties stood upon equal footing, and the one first tendering his application was entitled to preference. Since they were tendered simultaneously and both parties founded
32 their claim of right upon their first settlement, the secretary of the interior concluded that the Flahive right, which had been preserved intact, should be given preference over one which had been relinquished or abandond, nothing appearing to show that the latter had ever been reestablished prior to the date of Flahive's settlement. After a claim has once been abandoned, the right to it may be acquired by any other person who desires to take it.

Counsel for appellant have devoted much of their argument to the contention that the secretary in his decision of December 26, 1896, holding that the plaintiff was estopped by his sale to Rundall to claim a preference right, undertook to adjudicate the equities between the parties, whereas all these matters should have been left to be determined by a court of equity having cognizance of such matters. It is of no consequence whether the result of the sale be called an estoppel or an abandonment. The fact that there was a sale made was material in an investigation of the question then before the secretary and entirely within his jurisdiction to decide, to-wit: who made the prior settlement and was therefore entitled to entry. This being a question of fact, it was within the jurisdiction of the department to decide it, and in the absence of fraud, its finding must be deemed conclusive. (Small *v.* Rakestraw, *supra*, and cases cited.)

The judgment of the district court was correct and must be affirmed.

Affirmed.

THEO. BRANTLY,
Chief Justice.

We concur:

GEO. R. MILBURN,
Associate Justice.

WM. L. HOLLOWAY,
Associate Justice.

Opinion filed December 18th, 1905. Rehearing denied January 20, 1906.

33 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

Petition for Writ of Error.

To the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana:

Comes now Edward H. Love, plaintiff in error in above entitled cause, and feeling himself aggrieved by the decision of the Supreme

Court of the State of Montana rendered in the above entitled cause on the 18th day of December, 1905, and in which a motion for rehearing was denied on the 20th day of January, 1906, by Charles Edmund Pew, his attorney, respectfully represents to your Honor:

1. That this petitioner, as appears by the pleadings and the record, claims to be the owner of the lands in controversy in said above entitled cause, under the provisions of Chapter IV and Chapter V of Title 32 of the Revised Statutes of the United States of 1878, and amendments thereof;

2. That this action is not a personal action, but involves the title to specific real property, claimed by this plaintiff in error as above set forth;

3. That there was drawn in question in said above entitled action the construction of the United States Statutes contained in said Chapters IV and V of Title 32 aforesaid, and particularly Sections 2257, 2259, 2264, 2265 and 2266 of said Revised Statutes.

34 4. That under the provisions of said Chapter IV and Chapter V of said Title 32 aforesaid, said defendants in error are not entitled to said lands involved in this action, nor any part thereof, nor are either of said defendants entitled to any part of said lands.

5. That the decision of the said Supreme Court of the State of Montana in said above entitled cause was against the right and title so as aforesaid set up and claimed by this plaintiff in error, and that said decision was so rendered and the said Supreme Court of the State of Montana so decided against the right and title so set up and claimed by this plaintiff in error as aforesaid, because of the construction placed upon said statutes by the said Court; and that by reason of said construction so placed upon said statutes by said Supreme Court of the State of Montana, said land was by said Court decreed to belong to said defendants in error, and that your petitioner had no right or title thereto;

6. That the said Supreme Court of the State of Montana was then and there and still is the highest Court of law and of equity, and the highest court of law or of equity of the said State of Montana, in which a decision could be had in said above entitled suit.

7. And your petitioner further respectfully represents that in the records and proceedings, and also in the rendition of the said judgment in the above entitled cause, which is in the Supreme Court of the State of Montana, before you, a manifest error hath happened in the matters and things in your petitioner's assignment of error herein more specifically set forth, to the great injury and damage of your petitioner.

Wherefore your petitioner prays that it may please your Honor to grant unto your petitioner a writ of error to remove the

35 said cause and the record thereof into the Supreme Court of the United States, to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner; and that an order be issued to the District Court of Missoula County, Montana, staying all proceedings in said above

entitled cause until a hearing and decision is had in the said Supreme Court of the United States.

And your petitioner will ever pray.

CHARLES EDMUND PEW,
Attorney for Plaintiff in Error.

Writ of error allowed upon the execution of a bond by Edward H. Love, plaintiff in error, in the sum of $500.00. Said bond to be executed by two sufficient sureties, and when approved, to act as a supersedeas.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Dated January 23, 1906.
Petition filed January 23rd, 1906.

In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

36 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana before you or some of you, being the highest Court of Law or Equity of the said State, in which a decision could be had in the said suit between Edward H. Love and Annie Flahive and Andrew J. Lansing, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution of or a treaty or statute of, or commission held under the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Edward H. Love, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 31st day of March, next, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the
37 said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, 1906.

GEO. W. SPROULE,
[SEAL.] *Clerk of the Circuit Court of the United States, District of Montana.*

Allowed by:
THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Due service of the above writ of error this 31st day of January, 1906, and receipt of two copies left with me at the same time, is hereby admitted.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Due service of the foregoing writ of error and receipt of two copies thereof are hereby admitted this 3rd day of February, A. D. 1906.

WOODY & WOODY AND
E. E. HERSHEY,
Attorneys for Defendants in Error.

Writ filed in the Supreme Court of the State of Montana on the 31st day of January, A. D. 1906.

38 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff & Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE & ANDREW J. LANSING, Defendant- & Respondents and Defendants in Error.

Bond on Appeal.

Know all men by these presents: That we Edward H. Love, of the County of Missoula, State of Montana, as principal, and John Morrison and Joseph H. Boyer of the same County and State, as sureties, are held and firmly bound unto Annie Flahive and Andrew J. Lansing in the full and just sum of five hundred dollars,

to be paid to said Annie Flahive and Andrew J. Lansing, or *his* attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of January, A. D., 1906.

Whereas, lately, to-wit, on the 18th day of December, A. D., 1905, at a session of the Supreme Court of the State of Montana in a suit pending in said Court between Edward H. Love, appellants and Annie Flahive and Andrew J. Lansing, respondents, a decree was rendered by said Court against the said Edward H. Love, and the said Edward H. Love having obtained from said Court an order allowing a writ of error on appeal to the United States Supreme Court to reverse the decree so rendered by said Supreme Court of the State of Montana, as aforesaid, and a citation directed to the said Annie Flahive and Andrew J. Lansing is about to be issued
39 citing and admonishing them to be and appear at the Supreme Court of the United States;

Now therefore, the condition of the above obligation is such that if the said Edward H. Love shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him if he fail to make his plea good, then the obligation is to be void, otherwise to remain in full force and virtue.

(Signed) EDWARD H. LOVE. [SEAL.]
(Signed) JOHN MORRISON. [SEAL.]
(Signed) JOSEPH H. BOYER. [SEAL.]

STATE OF MONTANA, *County of Missoula, ss:*

John Morrison and Joseph H. Boyer, whose names are subscribed as sureties to the above bond, being severally duly sworn, each for himself, says: that he is worth the sum in said bond specified, as a penalty over and above all his just debts and liabilities exclusive of property exempt by law from execution.

(Signed) JOHN MORRISON.
(Signed) JOSEPH H. BOYER.

Subscribed and sworn to before me this 29 day of January, A. D. 1906.

(Signed) H. J. BURLEIGH,
Notary Public in and for the County of Missoula, State of Montana.

Approved this 31 day of January, 1906.

(Signed) THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest as to approval and approved by
JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

40 In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

Citation.

The President of the United States to Annie Flahive and Andrew J. Lansing, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within 60 days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Montana, wherein Edward H. Love is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 31 day of January, A. D. 1906, and of the Independence of the United States, the one hundred and thirtieth.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Signed and allowed by the Chief Justice this 31st day of January, A. D. 1906.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing citation and of the Writ of Error mentioned therein acknowledged at Missoula County this 3rd Day of February, A. D. 1906.

WOODY & WOODY AND
E. E. HERSHEY,
Attorneys for Defendants in Error.

41 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

Assignment of Error.

Comes now Edward H. Love, Plaintiff in Error herein, by Charles Edmund Pew, his attorney, and says that the record and proceed-

ings in the above entitled cause show that there is manifest error in this, to-wit:

1. That the Supreme Court of the State of Montana erred in holding that plaintiff in error was not and is not entitled to the land involved in said above entitled action, and the whole thereof, as first settler under the pre-emption and homestead laws of the United States.

2. The Supreme Court of the State of Montana erred in holding that the action of the District Court of Missoula County, Montana, sustaining the demurrer to the plaintiff's complaint in above entitled action was correct.

3. The Supreme Court of the State of Montana erred in holding that said District Court did not err in deciding that the plaintiff's complaint in said action did not state a cause of action.

4. The Supreme Court of the State of Montana erred in holding that the action of the District Court of said Missoula County in entering judgment for defendant and against plaintiff in said action, upon said complaint and the demurrer thereto was correct.

42 5. The Supreme Court of the State of Montana erred in holding that it was immaterial whether the homestead application of plaintiff was in fact filed before that of defendant Flahive was filed or not.

6. The Supreme Court of the State of Montana erred in not treating the application of plaintiff Love as having been filed April 5th, 1889, and that of Flahive as having been filed June 14th, 1889.

7. The Supreme Court of the State of Montana erred in holding that the alleged sale from Love to Rundall and from Rundall to Flahive estopped plaintiff in error from afterwards asserting title to the land in controversy, and in holding that said alleged sale operated to defeat the operation of the pre-emption and homestead laws of the United States.

8. The Supreme Court of the State of Montana, erred in holding that the land department committed no error in construing the law in allowing the estoppel alone to defeat the operation of the statute, and in holding that it operated to prevent plaintiff from making a new application after the forfeiture of Flahive.

9. The Supreme Court of the State of Montana erred in holding that the plaintiff in error ever abandoned said lands or any part thereof.

10. The Supreme Court of the State of Montana erred in holding that defendants or either of them, or their predecessors in interest, or the predecessors in interest of either of them, ever acquired any right to said land superior to those of this plaintiff in error.

11. That the Supreme Court of the State of Montana erred in holding that defendants in error or either of them ever were or now are entitled to and are the owners of said lands or any part thereof.

43 12. The Supreme Court of the State of Montana erred in holding that under simultaneous filings by Love and Flahive, that Flahive was entitled to the land in controversy or any part thereof.

13. The Supreme Court of the State of Montana erred in not hold-

ing that under simultaneous filings Love was entitled to the land, it appearing by the complaint and being admitted by the demurrer that plaintiff in error was in possession of the land at the time of and after the forfeiture of Flahive.

14. The said Court erred in holding that the Land Department committed no error in refusing upon the hearing before the Honorable Secretary of the Interior to make a finding of the relative dates of the filing of the homestead applications of Love and of Flahive.

Wherefore, said plaintiff in error prays that the said judgment of the said Supreme Court of the State of Montana be reversed and that the said Court be directed to enter an order reversing the judgment herein.

And your petitioner will ever pray.

CHARLES EDMUND PEW,
Attorney for Plaintiff in Eror.

Assignment of errors filed in the Supreme Court of the State of Montana January 23rd, A. D. 1906.

44 STATE OF MONTANA,
Office of the Clerk of the Supreme Court, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing 43 pages contain a true copy of the records in the case of Edward H. Love *vs.* Annie Flahive and Andrew J. Lansing, including the transcript filed in this Court; a copy of the opinion of this Court and a copy of the judgment rendered herein by said Supreme Court; also a copy of the assignment of error filed by the plaintiff in error herein; and also a copy of the citation filed herein; all of which is hereby certified and transmitted to the Supreme Court of the United States in obedience to the writ of error filed herein, of which a true copy is also contained in the foregoing record, together with a copy of the petition for the said writ, a true copy of the order for its issue, and a true copy of the undertaking for costs, filed by the plaintiff in error, as the same, and all of the same, appear from the records of my office.

I also hereby certify that the original citation and writ of error were lodged in my office on the 31st day of January, 1906, together with two copies of each of same for defendants in error, and that the originals of said citation and writ of error are hereto attached and herewith transmitted to the said Supreme Court of the United States.

Witness my hand and the seal of the said Court this 9th day of February, A. D. 1906.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

45 In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff in Error,

vs.

ANNIE FLAHIVE and ANDREW J. LANSING, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana, before you or some of you, being the highest Court of Law or Equity of the said State, in which a decision could be had in the said suit between Edward H. Love, and said Annie Flahive and Andrew J. Lansing, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution of or a treaty or statute of, or commission held under the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Edward H. Love, plaintiff in error, as by his complaint appears.

46 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 31st day of March next, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 30th day of January, A. D. 1906.

[Seal United States Circuit Court, District of Montana, 1880.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States, District of Montana.

Allowed by:

THEO BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Foregoing writ of error served and copy received this 3rd day of February, 1906.

WOODY & WOODY and
ELMER E. HERSHEY,
Attorneys for Defendants in Error.

Due service of the above writ of error this 31st day of January, 1906, and two copy-s left with me at the same time, is hereby admitted.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

47 [Endorsed:] 2194. In the Supreme Court of the United States. Edward H. Love, Plaintiff in Error, *vs.* Annie Flahive and Andrew J. Lansing, *Lansing,* Defendants in Error. Writ of Error. Filed January 31, 1906. John T. Athey, Clerk. Thomas C. Bach and Charles Edmund Pew, Attorneys for Plaintiff in Error.

48 In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff & Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE & ANDREW J. LANSING, Defendants & Respondents and Defendants in Error.

Citation.

The President of the United States to Annie Flahive & Andrew J. Lansing, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within 60 days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Montana, wherein Edward H. Love is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parities in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 31 day of January, A. D. 1906, and of the Independence of the United States, the one hundred and thirtieth.

THEO BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Signed and allowed by the Chief Justice this 31st day of January, A. D. 1906.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing Citation and the Writ of Error mentioned therein acknowledged at Missou County this 3rd day of February, A. D. 1906.

WOODY & WOODY,
ELMER E. HERSHEY,
Attorneys for Defendants in Error.

49 [Endorsed:] 2194. In the Supreme Court of the Unit States. Edward H. Love, Plaintiff in Error, *vs.* Annie Fl hive and Andrew J. Lansing, Defendants in Error. Citation. Fil January 31, 1906. John T. Athey, Clerk. Thomas C. Bach a Charles Edmund Pew, Attorneys for Plaintiff in Error.

50 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Erro
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendant- and Respon ent- and Defendant- in Error.

Proof of Service.

Due service of the petition for writ of error and assignment error in the above entitled action, and receipt of 2 copies of ea thereof, admitted this 3rd day of February, 1906.

WOODY & WOODY and
ELMER E. HERSHEY,
Attorneys for Defendants in Error.

51 [Endorsed:] 2194. In the Supreme Court of the State Montana. Edward H. Love, Plaintiff in Error, *vs.* Ann Flahive and Andrew J. Lansing, Defendants in Error. Proof Service. Filed Feb'ry 6, 1906. John T. Athey, Clerk. Charl Edmund Pew, Attorney for Plaintiff in Error, Helena, Montana.

Endorsed on cover: File No. 20,147. Montana supreme cou Term No. 236. Edward H. Love, plaintiff in error, *vs.* Annie Fl hive and Andrew J. Lansing. Filed March 23d, 1906. File N 20,147.

IN THE

SUPREME COURT

OF THE UNITED STATES

EDWARD H. LOVE,

Plaintiff in Error,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

This is a suit in equity, originally brought by plaintiff in error in the District Court of Missoula County, Montana, to have defendant in error Flahive declared to hold the legal title to certain lands in Missoula county aforesaid, in trust for plaintiff in error.

The complaint of plaintiff was demurred to by defendants on the alleged ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment entered for defendant in error upon the complaint and the demurrer.

An appeal was then taken by plaintiff to the Supreme Court of Montana, being the highest court of that state, whereupon the decision of the District Court was affirmed. The case now comes before this court upon a writ of error to the said Supreme Court of Montana.

The allegations of the complaint being admitted by the demurrer, we will refer to the facts alleged in the complaint and the exhibits thereto attached and made a part thereof, as facts found.

STATEMENT OF FACTS.

In May, 1882, Edward H. Love, Plaintiff in Error, who was qualified to enter and receive patent for a homestead, settled upon the East Half of the Southeast Quarter of Section 22, and the East Half of the Northeast Quarter of Section 27, all in Township 20 North of Range 26 West, in Missoula County, Montana, being contiguous legal subdivisions, and forming a strip of land one mile in length and one-fourth of a mile wide, for the purpose in good faith of entering the same and obtaining a United States patent therefor as a homestead, said land being at that time unsurveyed public land, and subject to settlement, occupancy and improvement, "and that the plaintiff in the year aforesaid, as he of right might and could do, erected a dwelling house thereon, and built a good and substantial fence around said land, enclosing the same, with the exception of the north twenty acres thereof, and continuously occupied, possessed and improved the same up to the date hereinafter mentioned."

Record, pp. 1, 2 and 5.

Also on page 7 of the Record, in the findings of fact of the Commissioner: "It would appear that at the time he initiated his claim in May, 1882, he was entitled to 160 acres as against the government; that he went to work at once and built him a house, and enclosed the whole of the land claimed by him so far as he was able to at that time, with the exception of N. ½ of the north forty; that Flahive himself worked for Love upon the fence that enclosed the land mentioned without making any claim whatever for any portion of it."

The Township was thereafter duly surveyed and the plats

of survey thereof were returned to the U. S. District Land Office at Helena, Montana, December 11th, 1888.

See Record p. 2, Par. III of Complaint.

On January 2nd, 1889, Love prepared and filed his application to enter said subdivisions as a homestead. Said application was rejected by the officers of the local land office as to the portion lying in Section 27, on the ground that it was claimed by the Northern Pacific Railroad Company. Plaintiff Love appealed from this action of the local office, to the Commissioner of the General Land Office, who rejected the claim of the company and sustained plaintiff's application, which decision of the Commissioner is still in full force and effect.

See Record, p. 2.

On June 14th, 1889, one Michael Flahive made application to enter the Southeast Quarter of Section 22, which included the north eighty acres of plaintiff's claim aforesaid, including sixty acres of the land fenced, occupied and improved by said plaintiff Love. The officers of the local land office found that the applications of Flahive and of Love were simultaneously filed on June 14th, 1889.

See Par. IV of Complaint, p. 2 of Record.

On August 14th, 1890, a hearing was had in the land office at Helena upon these applications, and a decision rendered awarding the land to plaintiff Love. Michael Flahive appealed from this decision to the Commissioner of the General Land Office, and on July 26, 1892, the decision of the local office was affirmed. Exhibit A is a copy of the opinion handed down by the Commissioner in that case.

See Record, pp. 3 and 7.

Michael Flahive appealed from the latter decision to the Secretary of the Interior, by whom it was affirmed, and the land again awarded to Plaintiff Love.

See Record, p. 3.

On January 30, 1895, a motion for a rehearing was made by Annie Flahive, defendant in error, widow of Michael Flahive (the latter having died during the pendency of the contest in the land office) on the alleged ground that "Love had parted with any title and interest in the land in controversy by a sale of said premises to one Rundall, who had in turn sold to Flahive." A rehearing was granted on that question alone, in the land office at Helena, and on June 4th, 1895, the land was again given to Love. On appeal to the Commissioner this decision was again sustained, but on a motion for review, the Commissioner reversed his decision, and awarded the land to Flahive upon the ground that Love was estopped by the alleged sale from claiming the land. This decision was affirmed by the Secretary of the Interior on December 26, 1896.

See Record, p. 3, also pp. 10 to 15.

Edward H. Love made a motion for review of the decision of December 26, 1896, which motion was denied by the Secretary March 15, 1897.

See Exhibit B, pp. 8 and 9 of Record.

It appears from Exhibit B that Love offered to show that his application was in reality filed as early as April 5, 1889, but that the Secretary refused to consider the point, upon the alleged ground of estoppel. See Record, pp. 8 and 9.

It appears that Flahive settled upon the West Half of the Southeast Quarter of Section 22 in October, 1884. Record, p. 7.

The first claim made by Flahive to the land in dispute as against Love, was in 1886, when Love attempted to fence the north twenty acres. He claimed it then by purchase from Rundall, who in turn claimed it by purchase from Love in September, 1883.

Record, pp. 7 and 10 to 15.

The hearing at which the evidence referred to in Exhibit C was taken was had for the sole purpose of determining the question of the alleged sale.

Record, p. 10.

Patent issued to Annie Flahive for the Southeast Quarter of Section 22 in December, 1899.

Record, p. 5.

The complaint also alleges that the acts of the land department in awarding the land to Flahive was done under a mistaken construction of the Acts of Congress applicable thereto, entitled "Pre-emption and Homestead," and the acts amendatory and supplemental thereto.

Record, p. 3.

That the right, title and priority of plaintiff and defendant Annie Flahive depend entirely upon the construction and interpretation of the United States Statutes aforesaid; that by reason of the error and mistake of the Land Department in construing and interpreting said statutes the land was erroneously awarded to defendant Flahive; that plaintiff does not know the necessary cost of obtaining patent which is chargeable to plaintiff, but that he tenders the same into Court upon the same being ascertained; that no action of ejectment has been commenced against the plaintiff to recover possession of said premises on account of said patent or otherwise, notwithstanding his actual possession as aforesaid since 1882; that immediahely upon the issuance of patent to defendant this plaintiff took steps to have this action brought; that no material or substantial change had occurred in respect to said premises and that he has diligently prosecuted his claim and equities and verily believes he is entitled to the relief demanded, and that said plaintiff claims and as-

serts his title and right under the United States Statutes aforesaid.

Record, p. 5.

That on January 22, 1900, Annie Flahive made and executed a mortgage to Andrew J. Lansing upon the Southeast Quarter of Section 22 aforesaid.

Record pp. 5 and 6.

Plaintiff Love filed his complaint in this action on December 3, 1900, setting up the foregoing facts, and asking that Annie Flahive be adjudged to hold the legal title to the East half of the Southeast Quarter of Section 22 aforesaid in trust for plaintiff, and to have the amount due said Lansing under said mortgage determined, and the same satisfied out of the West half of said Quarter Section.

Complaint, pp. 1 to 15 of Record.

Defendants demurred to the complaint on the alleged ground that said complaint did not state a cause of action.

Record, p. 16.

The demurrer was by the Court sustained, and the default of plaintiff for not amending entered.

Record, p. 16.

Thereafter, on December 6th, 1904, judgment was rendered for defendants.

Record, pp. 16 and 17.

An appeal was then taken to the Supreme Court of Montana, and the judgment of the District Court was thereupon affirmed.

Record, 17 to 22.

A writ of error was then prosecuted to this Court.

Record, pp 22 to 32.

JURISDICTION OF COURTS OF EQUITY.

It is well settled that where the land department awards land to the wrong person by reason of an erroneous construction of the law, the patentee becomes a trustee of the legal title for the person who was upon a correct construction of the law entitled to the land; and a court of equity has jurisdiction to determine the question of title between such persons and decree a transfer of the legal title to the person to whom the land department would have awarded the land had it not erred in its construction of the law.

Johnson vs. Towsley, 13 Wall, 72.
Sanford vs. Sanford, 139 U. S. 647.
Baldwin vs. Stark, 107 U. S. 463-465.
Hawley vs. Diller, 178 U. S. 489.
Samson vs. Smiley, 13 Wall 91.

The record shows that upon all the hearings the Land Department found that Plaintiff Love was the prior settler and had complied with the law so as to entitle him to patent. The Department, however, afterward took the land away from him upon the alleged ground of estoppel by reason of an alleged sale. This we contend was error, and it is one of the questions this Court is asked to pass upon.

THE FEDERAL QUESTION.

This Court has jurisdiction of the case, without doubt. Love, plaintiff in error, claimed title to the land in controversy under the United States Statutes (see record p. 5). That claim was denied by the highest court of the state of Montana. This is determinative of the jurisdiction of this Court.

In N. P. R. R. Co. vs. Colburn, 164 U. S. 385, which involved similar questions, the Court said:

"If the company had relied upon this decision (referring to the decision of the land department) as its defense against the action, and the Court had decided *in favor* of its validity (of the title claimed by the Company), a different conclusion might be reached. The judgment of the Supreme Court of the State was *adverse* to the claim of title made by the Company. It denied to it the right which it asserted under the Act of Congress, and a Federal question is therefore presented."

The determination of this case involves the construction of the preemption and homestead laws and acts amendatory and supplemental thereto.

The decision of the case upon any ground calls for the construction of United States Statutes, and a Federal question is without doubt presented.

Samson vs. Smiley, 13 Wall. 91.

Johnson vs. Towsley, 13 Wall. 72.

Kansas Pac. Ry. Co. vs. Atchison Ry., 112 U. S. 416.

Quinby vs. Conlan, 104 U. S. 420.

Osborne vs. Bank of U. S., 9 Wheat. 738.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Montana erred in holding that plaintiff in error was not and is not entitled to the land involved in this action as first settler under the preemption and homestead laws of the United States.

2. The said Court erred in holding that the action of the District Court of Missoula County, Montana, sustaining the demurrer to the plaintiff's complaint in this action was correct.

3. The said Court erred in holding that said District Court did not err in deciding that the plaintiff's complaint in said action did not state a cause of action.

4. The said Court erred in holding that the action of the District Court of said Missoula County in entering judgment for defendant and against plaintiff in said action, upon said complaint and the demurrer thereto was correct.

5. The said Court erred in holding that it was immaterial whether the homestead application of plaintiff was in fact filed before that of defendant Flahive or not.

6. The said Court erred in not treating the application of plaintiff Love as having been filed April 5th, 1889, and that of Flahive as having been filed June 14th, 1889.

7. The said Court erred in holding that the alleged sale from Love to Rundall and from Rundall to Flahive estopped plaintiff in error from afterwards asserting title to the land in controversy, and in holding that said alleged sale operated to defeat the operation of the preemption and homestead laws of the United States.

8. The said Supreme Court erred in holding that the land department committed no error in construing the law in allowing the alleged estoppel alone to defeat the operation of the statute, and in holding that it operated to prevent plaintiff from making application after the forfeiture of Flahive.

9. The said Court erred in holding that the plaintiff in error ever abandoned said lands or any part thereof.

10. The said Court erred in holding that defendants or either of them, or their predecessors in interest, or the predecessors in interest of either of them, ever acquired any right to said land superior to those of this plaintiff in error.

11. That the said Court erred in holding that defendants in error or either of them ever were or are now entitled to and are the owners of said lands or any part thereof.

12. The said Court erred in holding that under simultaneous filings by Love and Flahive that Flahive was entitled to the land in controversy or any part thereof.

13. The said Court erred in not holding that under simultaneous filings Love was entitled to the land, it appearing by the complaint and being admitted by the demurrer that plaintiff in error was in possession of the land at the time and after the forfeiture of Flahive.

14. The said Court erred in hold that the Land Department committed no error in refusing upon the hearing before the Secretary of the Interior to make a finding of the relative dates of the filing of the homestead applications of Love and of Flahive.

15. The Supreme Court of Montana erred in holding that the alleged sale affected the relations of the parties, it being conceded that Love did no act toward giving up any of his possessory rights.

The contentions to be urged in this argument may appropriately be stated and argued in the following order:

I.

The Land Department had no authority to make any finding as to the alleged sale.

II.

The alleged sale was null and void, assuming such a sale to have been made.

III.

Love never abandoned the land in dispute, nor was there any disclaimer by him.

IV.

Assuming that the alleged sale by Love operated as an abandonment, then Rundall's sale to Flahive also operated as an abandonment and let in Love's reasserted claim.

V.

Love became an original settler on surveyed land after the 11th day of March, 1889, and as such was entitled to the land under simultaneous filings.

VI.

Love's application should have been treated as filed April 5, 1889, as a matter of law.

Sections 2257 to 2288 inclusive of the Revised Statutes of the United States gave the right of preemption, and prescribed the limitations and mode of its exercise.

All facts necessary to establish Love's right to the land being admitted, except as to the effect of the transaction between him and Rundall, it will be unnecessary to here recite all the statutes upon which his right is based. The sections with which we are particularly concerned are Sections 2259, 2263, 2265, 2266, and 2273, and the Act of May 14, 1880, read as follows:

Section 2259, U. S. R. S., 1878, provides:

> "Section 2259. Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as rquired by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to preemption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

Section 2263 provides:

"Sec. 2263. Prior to any entries being made under and by virtue of the provisions of section 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; *and all assignments and transfers of the right hereby secured prior to the issuing of the patent, shall be null and void.*"

"Sec. 2265. Every claimant under the preemption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the law.

"Sec. 2266. In regard to settlements which are authorized upon unsurveyed lands, the preemption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such preemption settlement."

Section 3 of the Act of May 14, 1880, reads as follows:

"Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether *surveyed or unsurveyed,* with the intention of claiming the same under the homestead laws, shall be allowed the same time to file

his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws."

I.

The first question to be considered is whether the land department had authority to make any findings with reference to the alleged sale. The hearing of March 29, 1895, (Record, pp. 10-15), was for the sole purpose of taking testimony upon that question. (Record, p. 10.)

If the final findings based upon that hearing were without jurisdiction, then all findings upon that point must be disregarded, and the complaint being sufficient without question after such findings are eliminated, plaintiff in error is entitled to a reversal without going further into the case.

The land department undoubtedly has authority to make such findings of fact as are necessary in the determination of the one question which was committed to it by the Acts of Congress, namely, who had made the first settlement upon the land and otherwise complied with the law so as to be entitled to patent.

But its authority ends there. Being created for the purpose of performing certain enumerated duties, and its judicial powers being defined by statute, its jurisdiction is limited to the power expressly granted. Its authority in land contest cases is defined by Section 2273, U. S. R. S., which reads as follows:

"Sec. 2273. When two or more persons settle on the same tract of land, *the right of preemption shall*

be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the *right of preemption* arising between different settlers shall be determined by the register and receiver of the district within which the land is situated."

This clearly limits the scope of its authority to the single proposition, who made the first settlement and conformed to the other provision of the law, to-wit, occupied and improved the land.

The land department found repeatedly that Love made the first settlement and conformed to the other provision of the law, which finding has never been reversed. Right there the jurisdiction of the land department ended, and the patent should have been issued to Love upon that finding. When the rehearing was ordered upon the ground of the alleged sale, the department acted without authority, and any findings made upon that or subsequent hearings were void for want of jurisdiction, and are not binding upon the Courts. The only ground upon which the Department had authority to grant a further hearing would have been that of fraud or mistake in the former finding as to settlement and compliance with the law. This was not pretended to be the basis of the motion, but it is expressly founded upon the allegation that Love was estopped from asserting *the rights which he acquired by compliance with the law,* by reason of the alleged sale.

This case clearly falls within the principle announced by this Court in Noble vs. Union River Logging R. R., 147 U. S., 176. Mr. Justice Brown, delivering the opinion of the Court, said:

"In Moore vs. Robbins, 96 U. S. 530, 533, it was said directly that it is a part of the daily business of offi-

cers of the Land Department to decide when a party has by purchase, by preemption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; 'but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . The functions of that department necessarily cease when the title has passed from the government.'

"We think the case under consideration falls within the latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and *when decided,* and his approval was noted upon the plats, the first section of the act *vested the right of way in the railroad company.* * * * The railroad company became at once vested with a right of property in those lands, of which they can only be deprived by *a proceeding taken directly for that purpose.* If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. * * * A revocation of the approval of the Secretary of the Interior, however, by his successor

in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."

The same principle applies in this case even though patent did not actually issue to Love. All the facts necessary to entitle him to it had been found, and had become final; and so long as the land was not withdrawn from sale, his right to patent was absolute. Those facts could only be reviewed upon a charge of fraud, and possibly mistake, and then only *in a proceeding instituted for that purpose.* No such proceedings was ever instituted.

The grant passes from the Government to the prior settler; and the sole duty of the Land Department is to determine who *is* the prior settler. In this it acts as the agent of the Government, and has no authority to step between parties and determine alleged rights as between such parties. The Government has no interst in such controversies, as under the provisions of Section 2263, *supra*, they do not affect the right of the prior settler to the land.

It appears very clear to us that the findings of the Department with reference to the alleged sale must be disregarded, and the findings of the Commissioner of July 26, 1892, affirmed by the Secretary of the Interior on February 12, 1894, be given effect.

The authority to pass upon equities claimed to exist between parties is vested in the Courts, and no attempted usurpation of that authority by a special tribunal can in any degree affect the jurisdiction of the Courts in such controversies. As stated by this Court in Garland vs. Wynne, 20 Howard, 6: "Nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

Monroe Cattle Co. vs. Becker, 147 U. S. 47, 57.
See also Turner vs. Sawyer, 150 U. S. 587.

If it appears that Love was deprived of the land without due process of law, this Court has jurisdiction to right the wrong. We submit that the action of the Secretary in giving the land to Flahive in the manner shown by the record is without due process.

The land should have been awarded to Love under the valid findings of the Land Department, and then if Flahive had acquired any enforceable rights by the alleged sale, which was the *sole question* upon which the hearing of March 29, 1895, was had, recourse could have been had to the Courts and their rights determined in a proper forum.

The claims of the parties are before this Court, and such disposition may now be made of the land as may appear just and equitable.

The findings of the Land Department that Love was the prior settler and as such was entitled to the land, necessarily included a finding that his occupancy had been so continuous since 1882 as to prevent other settlers from initiating a settlement on the land. The decisions based upon the hearing of March 29, 1895, did not review any part of those findings, nor was the hearing had for that purpose. The findings as to prior and continuous settlement having been finally affirmed by the Secretary of the Interior in favor of Love, all the presumptions were then in his favor. Nothing short of a finding of fact that he was not the prior and continuous settler upon the specific land in dispute would then justify a reversal; and such findings must be made *in a proceeding for the purpose of reviewing the former findings.* Those facts, however, had been repeatedly and finally found in favor of Love; and the

rehearing was granted *solely for the purpose of inquiring about the alleged sale.* In the Secretary's own words: "at this hearing the local officers will confine the testimony to the evidence introduced and that in contravention of the alleged sale of Love to Rundalls."

Record, p. 10.

This expressly prohibits the local officers taking any testimony bearing upon the questions of fact which had already been repeatedly affirmed and had become final.

McDonald vs. Hartman, 19 L. D. 551.

The scope of this hearing is thus narrowed down to the question of the sale of the Finley logs as an estoppel, as an intent to abandon, or as a disclaimer. The first was without the jurisdiction of the Land Department; the second if admitted was insufficient, without the finding that the former findings of fact were erroneous, and a new finding of *actual* abandonment, neither of which could be made at that hearing; and the third is negatived by the former and final finding of fact that Love had settled upon, inhabited and continuously occupied and improved the land from May, 1882, to the time of the hearing.

As before suggested, the Department had jurisdiction only to make findings of fact; and certainly it could not be said that the findings of fact shown in the record justify the decision of the Department in finally depriving Love of the land, and as before mentioned, the Department was precluded by its own order from disturbing the former findings of fact, all of which were in Love's favor. The issuance of the patent to Flahive upon any showing which could be permitted or considered at that hearing was without due process of law.

While we do not believe this Court will consider the Secretary's letter of Dec. 26, 1896, for any purpose, yet

if it is deemed that some of the matters there shown are pertinent to this inquiry, then in view of the fact that there are no specific findings in that letter, this Court can look to the evidence contained in the record (pp. 10 to 15), and make its own findings; but we do not believe that the Court would consider the testimony in its incomplete and fragmentary form. If any pertinent questions are raised, there should be an opportunity to try those questions of fact upon testimony introduced in a proper forum, upon issues regularly joined, instead of upon the *exparte* proof taken by the Land Department in a hearing which we contend was without jurisdiction.

The findings of the Department with reference to the settlement of the parties is contained on page 7 of the record, and are in part as follows:

> "After survey in 1886 when Love attempted to complete his fencing for the north half of the north forty Flahive made threats of violence against him, he, Flahive, having in 1885, cultivated one or two acres of the land on the said forty outside of Love's enclosure.
> "The fact that Love's house was not situated in any portion of the land in controversy is of no moment, for in making his claim as evidenced by his fencing Love intended to include the four forties north and south, that is an aggregate body belonging together, and are not to be separated and Love's house being built on any one forty is considered as constructed upon and belong with the whole of the land to the extent of 160 acres.
>
> *"It is evident from the testimony that Flahive has no right whatever to any portion of the E. ½ of S. E. ¼ of Section 22, T. 20 N. R. 26 W, as against the claim of Love;* his application to make homestead

entry is accordingly rejected to the extent of the said tract subject to appeal within sixty days."

These findings were affirmed by the Secretary of the Interior February 12, 1894.

Now, it may please the Court, that was the time for both parties to introduce all the testimony they could bring forward as to the sole and only questions necessary to be decided, *who was the prior settler and had continuously inhabited and improved the land in dispute.* It was incumbent upon Flahive to show *at that time* if he could that Love was not claiming or occupying the land at the time Flahive settled upon the S. E. ¼ of Sec. 22, either by showing that he had never claimed it, or by showing that he had *abandoned and deserted it and had not reclaimed it before Flahive's settlement, all of which he failed to do, and all those questions were found in favor of Love* as above shown. No hearing was ever had at which those findings could be reopened, and they are therefore final and incontrovertible. Those findings being so, being made upon the only questions necessary for the Department to determine to decide the rights of the parties to patent, the patent should have been issued in accordance therewith. No conclusion made at the subsequent hearing could in any manner affect the rights of Love, since the facts which were vital had all been finally decided in his favor.

In the case of McDonald et al. vs. Hartman et al., 19 L. D. 551, Secretary Smith said:

"There must of necessity be somewhere an end to controversy. Their settlement and preemption rights to these lands involved in the controversy concerning the Sioux half breed scrip locations of Orille Stram were fully considered, and finally determined

by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891, (12 L. D. 157), and the introduction into the record of this case of the evidence referred to *can not resurrect and revitalize that dead issue.*

"In your office letter 'H' of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that——

'should they set up any claim as preferred contestants in regard to lots 5 and 6 and SE ¼ of NW ¼ of said section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and be heard with others.'

"This clearly limited the inquiry so far as they were concerned, to their 'claim as preferred contestants' as to their alleged preferred right to enter the lands described in said office letter 'H' * * * and their appeal here from your office decision brings before me for consideration, so far as they are concerned, *that single question and none other.*"

The principle contended for by us is well established in law; and we quote from the above decision merely to show that the practice of the land department itself prevents the consideration of any other than the single question presented on the second hearing, even assuming it has authority to inquire concerning the alleged sale. As in the case cited, the Department was precluded by its own order from inquiring concerning any other question than whether there was a sale, and if so, was it sufficient to transfer the rights claimed by Love to the grantee of Rundall.

But even looking at the testimony (there being no specific finding of fact by the Secretary upon that testimony),

what do we find? Rundall testifies that he bought the *Finley* claim of Love, and that he settled upon it. It appears by his testimony and that of others that his house was on the Northeast quarter of Sec. 22, and that he sold that quarter to Thomas. It does not appear that he ever settled in any other place or built any other house, nor does it appear that he ever had possession of the eighty in dispute or any part of it. Upon settled principles of law, which we will discuss later on, all of this must be disregarded, first, as showing that Love's rights were not affected by the sale of the Finley logs, and second, that the transaction could not affect his rights as against Flahive in face of the unquestioned finding of fact that as between Love and Flahive the former was entitled to the land by virtue of prior settlement and improvement, for Flahive could only date his rights from his own settlement. The finding that Love's settlement was prior to that of Flahive must prevail even though it were admitted that the former had disclaimed the land in 1883. It merely made Love's settlement date after September, 1883, and if Flahive found Love in possession (and the established findings show that he did) and claiming the land at the time the former settled in 1884, he could not inquire into any previous transactions. The finding of the Department upon the questions of prior settlement, inhabitation and improvement is presumed conclusively to have been made with all available evidence before it, and having upon that evidence made a finding that Love was the prior settler, and that finding having become conclusive, the right of Love to the land cannot be disturbed. Love's settlement being found to be prior to Flahive's, it matters not whether it is considered as of May, 1882, or as initiating the day before Flahive's settlement.

Referring again briefly to the record, the Secretary stated on page 14 thereof: "It is evident from Love's statement of the transaction that conceding the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. F. Finley, upon which the logs were situated was about to be taken by Rundall."

Suppose that is so; what then? It has been conclusively determined that Love initiated a right to the E. ½ of the S. W. ¼ of Sec. 22 in May, 1882; the fact that he sold some logs for Finley, whose claim at that time, before survey, was not so well defined but that he *may* have lapped over onto the ground afterward determined by the survey to be in the above described eighty acre tract, does not in any degree show that Love disclaimed or abandoned that eighty. He knew that Rundall could not take any of Love's 160 acres, and what difference does it make in this case if he did know that Rundall could "jump" Finley's claim?

Nor does the record show that Rundall ever did jump the eighty. So that whatever fears Love may have had, so far as the record shows they were unfounded. And the fact that Rundall's house was built on the N. E. ¼ of Sec. 22, near the center of the quarter, according to witness Merritt (p. 13 of Record), and at least forty rods from the line according to Rundall's own testimony, together with the fact that he afterwards sold that quarter to Thomas, warrant the presumption that the Finley claim was the N. E. ¼ of Sec. 22. This, together with the presumption raised in Love's favor by the findings of fact above referred to at length, leave no room for doubt that patent should have been issued to him.

So that a consideration of the evidence upon which the Secretary confessedly based his conclusion discloses no material fact upon which to base a conclusion that Love ever lost any of his rights under his settlement in 1882. His continuous inhabitation and improvement since that time are incontrovertibly established; and the fact that it appears by the record that any sale he ever made was of the Finley logs strengthens the presumptions in his favor, for it is evident from that that he was not attempting to dispose of any of his own rights. Nor would the fact that he may have known that the purchaser of the logs would claim the land show anything detrimental to his rights; for he knew that his own 160 acres were safe from being jumped.

The questions we have thus far discussed we believe are vital, and earnestly recommend them to the careful consideration of this Court.

II.

THE ALLEGED SALE WAS NULL AND VOID.

Any unexecuted sale of preemption rights, whether they were those of Love or Finley, was, under the provisions of Sec. 2263, supra, absolutely as though it had never been conceived. This appears to us too patent to admit of extended argument.

> "Where particular contracts are inhibited by statute, and if attempted are in positive terms declared "utterly null and void," such contracts will not be enforced."

Gibbs vs. Cons. Gas Co., 130 U. S. 396.
Also Miller vs. Ammon, 145 U. S., 421.
Quinby vs. Conlan, 104 U. S., 420.
Hartman vs. Butterfield Lbr. Co., 199 U. S. 337.

The principle that a void sale is ineffectual for any purpose is well stated in Dung vs. Parker, 52 N. Y. 494:

> "A contract being void by the Statute is void for all purposes. It confers no right and creates no obligation as between the parties to it; and no claim can be founded upon it as against third persons. It cannot be enforced directly or indirectly. The plain intent of the statute is that no person shall be subjected to any liability upon an agreement."

Nor could it be said that the attempted sale, though ineffectual at the time, created an equity which could have been enforced by Flahive after patent, had the patent issued to Love. Being null and void when attempted, it will forever remain so. To hold a contrary doctrine would be to permit that to be enforced indirectly which cannot be enforced directly.

In Anderson vs. Carkins, 135 U. S., 483, this Court held:

> "A contract by a homesteader to convey a portion of the tract when he shall acquire title from the United States is against public policy and void; and it cannot be enforced although a valuable consideration may have passed to the homesteader from the other party."

We submit that any sale, no matter whose rights were attempted to be transferred, did not give rise to any equities between the parties. We have searched the decisions of this Court in vain for anything contrary to this view. Lamb vs. Davenport, 18 Wall. 307, and Stark vs. Starr, 94 U. S. 477, are not in point. In the former case the statute applied in its terms only to *future* sales, and in the latter case the land laws of the United States had not been extended over the Territory of Oregon, where the case arose, at the time of the alleged contracts.

The record shows that Love did not deliver the possession of any portion of his own claim, and so in any event he could not be affected by the alleged sale. The legal status of the parties was unaffected by the transaction.

The alleged sale could not, in any event, of itself and independently of possession, give Rundall the right as against Love to take the patent in his own name, and of course Flahive, merely as Rundall's grantee, could not receive patent as against Love, and the patent should have gone to the latter.

The only way in which either party could claim the land was by actual personal settlement and improvement. The Land Department repeatedly decided that as between Love and Flahive, Love had complied with the law, was the prior settler, and except for the alleged estoppel was entitled to the land. So that the only foundation for the claim of Flahive is the alleged sale. Under the law and the decisions of this Court it is clearly insufficient to support his claim of title.

Love has never given up his physical possession and occupancy of the land, nor would any unexecuted sale give Rundall or Flahive the right to compel him to give it up.

Even assuming that Love attempted to sell a portion of his own claim, yet the law finding him in possession of the land after the transaction will not disturb that possession and he is entitled to the benefit of the rights guaranteed to him by reason thereof. Flahive was bound to know, or is conclusively presumed to have known, of the existence of Section 2263 supra. Hence he could not have been deceived or misled to his prejudice, and for this reason, if for no other, he cannot be heard to assert that Love is estopped.

It does not appear that Flahive did anything to his injury or otherwise upon faith in the alleged sale. If he did

so in fact, he did it with full knowledge of its invalidity, and of the continuously asserted claim of Love, and cannot be heard now to complain.

But does the record even remotely suggest that Love was selling his own land? Most certainly not. It is shown by the evidence of all witnesses that whatever he was selling, land or logs, he was merely acting as agent for Finley. As hereinbefore argued, there is nothing in the showing made to connect him with Finley in such a manner as to estop him with respect to his own land. He would not even be estopped from afterward setting up a claim to the Finley claim did it become *publici juris*. By what course of reasoning could it be shown that he was estopped from claiming land then in his own possession and under fence? In any event, however, the question of estoppel is clearly eliminated from consideration in this case by the law and authorities and for the reasons set forth above.

The question then becomes simple, in view of the continuous actual possession of Love. Settlement, inhabitation and improvement secured to Love the right of preemption (see Sec. 2259, *supra*); and the irrefutable findings of the Department that Love had performed all of these acts and was the prior settler leave no room for the theory of abandonment or disclaimer. Before survey, all that was recognized was the possession, and improvement; and the time for the declaration of intention was when application was made to enter.

We respectfully submit that the question of estoppel has no place in the consideration of this case; that the sale of the Finley logs is not inconsistent with the former finding of the Department that Love settled upon, occupied and

improved 160 acres of unsurveyed land in 1882, which after survey proved to be the land described in the complaint; and that even though it were, it could not affect those former findings, not being made in a proper proceeding for that purpose.

III.

LOVE NEVER ABANDONED THE CLAIM IN DISPUTE, NOR WAS THERE ANY DISCLAIMER.

There is no abandonment by Love shown by the record. Here again the same error is made as previously suggested. It is assumed that Love had attempted to sell his own eighty and that thereby he abandoned it.

The record does not show that there was ever any intention on the part of Love to sell any portion of his claim. On the contrary, the testimony of both parties shows that whatever he sold, land or logs, he sold for Finley; and it certainly could not be said that such a sale evidenced any intention to abandon his own claim.

There are findings in the record that Love settled upon and improved 160 acres of land which after survey proved to be the land described in the complaint. Can those findings be overturned by the fact that he sold some land or logs for W. H. Finley, without an additional finding that the land sold, assuming he sold land, embraced the whole of the disputed eighty, and that he knew it? Assuredly not. The findings of the department had established all the facts necessary to make Love's right to the land perfect; and the burden was upon Flahive to prove, at a time when such proof was pertinent, that Love had intentionally abandoned the land described as the E. ½ of the S. E. ¼ of Sec. 22.

We submit that there is no such proof in the record, and that no such proof could have been introduced at the hearing of March 29, 1895. The question of settlement, inhabitation and improvement had repeatedly been decided in favor of Love, and was not an issue at the latter hearing. The said hearing was had solely to inquire as to the alleged sale, and the testimony was confined to that point.

Even a sale by Love (or attempted sale) of his own land would not have been evidence of an *intention* to abandon, to say nothing of it being a complete abandonment.

> "It is contended that the attempted sale and conveyance by Mrs. Foley to Brannan and others may be regarded as an abandonment by her of the possession of the premises. The elements of abandonment are quite different from those of a sale; and where for any reason a transaction fails as a sale, it cannot be converted into an abandonment."
>
> McLeran vs. Benton, 43 Cal. 476.
>
> Richardson vs. McNulty, 24 Cal. 339.
>
> Morse vs. Commissioners, 19 Mont. 452.

Even supposing the alleged sale was evidence of an *intention* to abandon, the record shows that Love never did actually leave the premises. The intent and act must concur or there is no abandonment.

> "To constitute abandonment the premises must be left vacant without the intention of reclaiming the possession, and open for the occupation of anyone who may choose to enter."
>
> Smith vs. Cushing, 41 Cal. 97.
>
> Stephens vs. Mansfield, 11 Cal. 366.
>
> "The intention to relinquish the possession may have been entertained, not only for a moment, but during the whole period of his possession; but if the

intention was not manifested by leaving the possession vacant, without the intention of returning, there was no abandonment."

Judson vs. Malloy, 40 Cal, 309-310.

Utt vs. Frey (Cal.), 39 Pac. 807.

Hickman vs. Link, 22 S. W. (Mo.), 422.

Settlement, inhabitation and improvement is all that the Act of Congress required before the land was offered for sale. No further right than the enjoyment of possession was guaranteed to the settler prior to such time. After the land was proclaimed for sale and the surveys were returned, the one who had performed those acts was guaranteed the right to enter the land as a homestead, and his declaration of intention to claim it as a homestead must be made within a limited time, or his exclusive right would be forfeited. No declaration of intention was required before such time.

To establish abandonment or such a disclaimer as would affect the rights of Love, it would have been necessary to have shown directly *in a proceeding for the purpose of reviewing the former findings* that those findings were erroneous, and that Love had at one time abandoned his possession and disclaimed the land, and that before he reasserted claim to the land the rights of Flahive had attached; and in such a hearing the entire case would necessarily have been opened up, and proof again taken upon the questions of settlement, improvement, and continuous inhabitation with intent to preempt. Then if Flahive showed abandonment in 1883, Love would have had an opportunity to show a reassertion of claim before October, 1884, the date of Flahive's settlement.

No such a finding having been made in such a proceeding in the Land Department, the former findings of fact

which were clearly within the scope of its authority cannot now be questioned, and Love must be awarded the land as the prior settler.

A sale of logs for Finley which proved after survey to have been upon land here claimed by Love is not evidence of a disclaimer by the latter, there being nothing to show that he knew that the logs were on his own land, or that they were on land then or previously claimed by him.

Admitting for the purpose of argument that the sale of the logs was a disclaimer of the land upon which those logs were situated, there is still no reason to extend the operation of such disclaimer further than that. There is nothing in the record to fix the position of the logs closer than that they were on some portion of the north forty. There is nothing to show that they were on any portion of the sixty which Love placed under fence. Nor would the possession of the unfenced twenty by Flahive, even supposing that the fact of his cultivation of an acre or two of it in 1885 is sufficient to show settlement and inhabitation, give Flahive any right to the portion so in the possession of Love. In Hosmer vs. Wallace, 97 U. S. 579, this Court said, per Mr. Justice Field:

> "Settlement, inhabitation and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, *though upon a subsequent survey by the government it prove to be a part of the same sectional subdivision.*"

So that even conceding that Flahive had a superior right to the unfenced twenty acres, that does not give him any right even to the remaining half of the same sectional subdivision, which was at the time of his first settlement in the possession of Love. Love would at least be entitled to the sixty acres.

But Love being in constructive possession of the entire eighty at the time of settlement by Flahive, he is clearly entitled to the whole of the disputed land.

Since the alleged sale is the basis of the rights which are claimed by Flahive against Love, and since the sale was of itself absolutely insufficient to support the claims of Flahive, and since the findings of the Land Department are that Love was the first to settle upon, inhabit and improve the disputed land, it is conclusive of the rights of the parties. The burden was upon Flahive to prove *prior settlement, inhabitation and improvement, at a time when those questions were at issue,* which he did not do; and those matters being peculiarly within the scope of the authority of the Department, and being decided in favor of Love, defendant in error Flahive cannot now be permitted to question those findings.

The theory of abandonment or disclaimer is clearly untenable, even had Love admittedly attempted to sell his own land without delivering possession; but in the light of the facts disclosed by the record we submit that such a theory cannot be considered seriously.

IV.

ASSUMING THAT THE TRANSACTION OPERATED AS AN ABANDONMENT AND LET IN LOVE'S THE PART OF LOVE, THEN RUNDALL'S PRETENDED SALE TO FLAHIVE ALSO OPERATED AS AN ABANDONMENA AND LET IN LOVE'S RE-ASSERTED CLAIM.

It is well settled that where two parties claim the same tract of land upon the public domain, the withdrawal of one of them instantly inures to the benefit of the other, to the exclusion of third parties.

Stone vs. Cowles, 13 L. D. 192.
McGowan vs. McGann, 15 L. D. 542.
Moss vs. Dowman, 176 U. S. 416-417.

Even assuming that Love's rights were suspended by the transaction, the same could be said of Rundall's rights when he made the pretended sale to Flahive, and Love's rights would again attach prior to Flahive's appearance upon the scene.

We find ourselves constantly compelled to resort to a fiction in making our argument. We have to assume that in the face of Love's continuous possession, which is not and cannot be questioned, that the alleged transaction could give anyone else, either Rundall or Flahive, the right to take the land. That this could not be is patent upon its face.

The only way Flahive could acquire a right to the land was by settlement and improvement. He could not acquire any rights by purchase which would be good as against the actual settlement and improvement of Love.

Gonzales vs. French, 164 U. S. 344.
Quinby vs. Conlan, 104 U. S. 425.

In that case the Court spoke as follows:

> "The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require *personal settlement* upon the lands desired and their inhabitation and improvement."

Again, on page 423: "The settlement which the law of Congress will recognize * * * must be personal to the settler, and not that of others who may have conveyed to him."

And the land being in the possession of Love and under

improvement by him, Flahive could not initiate a settlement.

> "To create a right of preemption there must be settlement, inhabitation and improvement, by the preemptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be a part of the same sectional subdivision. Under the preemption laws, as held in Atherton v. Fowler (96 U. S., 513), the right to make a settlement is to be exercised on unimproved land; and the right to erect a dwelling house is to be exexercised on vacant land. None of these things can be done on land when it is occupied and used by others."
>
> Hosmer vs. Wallace, 97 U. S. 579.

It appears by the record that Rundall never initiated any right to the eighty acres. There was then a year and more in which the claim of Love could attach and still be ahead of Flahive.

Here again the contention urged repeatedly in this brief forces itself upon us. The hearing of March 29th, 1895, was not called for the purpose of determining any question affecting the priority of settlement. That question had been settled finally and for all time,—that Love was the prior settler. The only question contemplated when the hearing was granted was *whether the rights which Love had acquired to the land by reason of his compliance with the law* had been *sold*, and whether Love was *estopped* from denying the right of the grantee of Rundall to the land.

The question of Love's intention to hold the land described in the complaint as his homestead had been decided finally by the Department on former hearings, and that finding, being one of fact within the scope of its authority, cannot be questioned. Under those findings the intent of Love to claim it as his homestead is presumed to have been continuous during all the period intervening between May, 1882, and the date of his application. So that the only question to be determined, is, was there a sale, and if so, was it sufficient to transfer the rights which Love had acquired by his settlement, inhabitation and improvement, to Flahive? There was no justification for attempting to make a finding or a conclusion of law as to abandonment or disclaimer. It would be manifestly unfair to Love to make any such conclusions, even if they were material and proper, that is, to make a conclusion that Love had disclaimed the land in 1883, without giving him an opportunity to show that he had reasserted his rights prior to Flahive's settlement in October, 1884.

But we also contend that the findings of July 26, 1892, show conclusively that at the time Flahive settled upon the S. E. ¼ of Sec. 22, Love was occupying the East half of that quarter *with the intention of making it his homestead.* The question of intent was one of the questions before the department at that time, and it was necessary to decide that Love had continuously occupied and improved the land with that intention at all times from prior to the time of Flahive's settlement down to the time of that hearing. Otherwise the finding could not have been made in Love's favor. The evidence upon which the finding was made not being before this Court, it must be presumed that it was sufficient to satisfy the officers of the facts ultimately found.

But as before suggested, Love's continued intention under the findings would require that in order for the attempted findings in the second hearing to militate against him, that they should show that *at the time of the initiation of the settlement by Flahive* Love had no intention of making it his homestead. The burden was on Flahive to show that; and in the absence of such a showing, the presumption remains that Love had the intention during all the time between 1882 and the filing of his application, with the possible sole exception of the time of the alleged sale. All findings of fact had been in Love's favor; and the burden was upon the other party to show that the disclaimer did actually continue to the time of Flahive's settlement, otherwise, it would be presumed to exist only for the period actually proved. The language of the Secretary was that "It thus appears * * * that this tract of land was not claimed by Love *at the date of the sale,*" etc. (Record, p. 15.) The finding that Love was in possession and claiming the land at the time of Flahive's settlement emasculates any finding as to disclaimer in 1883. But as we have suggested, the Department had no authority to change those findings at that hearing.

But it is only by a stretch of our imagination that we can conceive that there was any suspension of this intention shown by the testimony in the record.

It is clear that the Secretary erred in his conclusions. He adopted the theory that whatever the transaction may have been, whether a sale, abandonment or disclaimer, Love was estopped from now claiming the land.

Assuming his conclusions as to what the transaction was, he erred as to its effect. If it did operate to show that Love had no intention to hold the land as his homestead in September, 1883, it would be either presumed that

his intention was resumed immediately thereafter, or he was entitled to an opportunity to show that he had resumed that intention before the rights of Flahive set in.

We most respectfully submit that the rights of Love attached before Flahive's settlement, under the established findings of the Land Department, and that the finding that as between Love and Flahive the former was the prior settler, with intention to claim the land as a homestead, is conclusive of the rights of the parties here; that the rights of Love are prior and superior to those of Flahive, and that the Department had no right to make any findings altering in any respect the former findings of fact, inasmuch as the latter hearing was not had for that purpose. The only purpose for which that hearing was had was to see if Love had *transferred the rights which had vested in him by virtue of his compliance with the law*, and could not affect his right to the land as against the government. This was also unauthorized, and the conclusions of the Secretary are not binding here.

V.

LOVE BECAME AN ORIGINAL SETTLER ON SURVEYED LAND AFTER THE 11TH DAY OF MARCH, 1889, AND AS SUCH WAS ENTITLED TO THE LAND UNDER SIMULTANEOUS FILINGS.

The construction given Sections 2265 and 2266, supra, by this Court is that under them a prior settler in possession did not forfeit his right absolutely by not filing within three months, but that his claim could only be defeated by a settlement and *prior application* by another.

Johnson vs. Towsley, 13 Wall. 90-91.

On May 14, 1880, Congress passed an act making these

sections applicable to settlements on *surveyed* public lands. Section 3 of said Act reads as follows:

> "That any settler who has settled, or shall hereafter settle, on any of the public lands of the United States, whether *surveyed or unsurveyed,* with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws."
>
> 21 U. S. Stat. at Large, 140.

In this Act Congress adopted the construction theretofore placed upon sections 2265 and 2266, supra. So that Love being in possession at the expiration of three months from the return of the plats of survey, to-wit, March 11, 1889, and no filing being made by Flahive prior to that time, he (Love) then became a prior settler on *surveyed* land. Flahive then stood in no better position than a next settler, and as such was required to file first.

This is without doubt the true construction to be placed upon the Act of May 14, 1880, and under simultaneous filings we respectfully submit that Love is clearly entitled to the land.

VI.

LOVE'S APPLICATION SHOULD HAVE BEEN TREATED AS FILED AS EARLY AS APRIL 5th, 1889, AS A MATTER OF LAW.

We come now to the consideration of a question which we believe must be decided in favor of Love, and if so decided is without doubt vital.

It appears from the record that on January 2nd, 1889, Love prepared his application and presented the same to the land officials for filing, but that the said application was rejected because of the claim of t he Northern Pacific Railroad Company. Upon appeal from the action of the local officials, however, plaintiff's application was sustained. (Record, p. 2.)

It further appears that at the hearing of August 28th, 1890, the district land office found that Love's application was filed June 14th, 1889, that being the date upon which the application of Flahive was filed. It appears that the date of filing had not been endorsed upon Love's application (see Record, pp. 2, 10 and 14).

Love offered to show, upon a motion for rehearing, that the application bore the following endorsement, claiming that the application was filed as early as April 5th, 1889:

> "Received April 5, 1889, and rejected as to the E. ½ of the N. E. ¼ of Sec. 27, T. 20 N. R. 26 W., because the same is within the forty mile limits of the grant to the Northern Pacific Railroad Company, the withdrawal for the benefit of which took effect February 21, 1872; notice given (name illegible), attorney, personally, and thirty days allowed for appeal."
>
> "S. W. LANGHORNE, Register."

Plaintiff also offered other records of the Land Office to substantiate this claim. (See Record, p. 9.)

Secretary Bliss, in passing upon this question, used the following language:

> "It has not been deemed necessary to verify these contentions of counsel. *Assuming them to be true, and that the application of Love was in fact made April* 5, 1889, *and that the application of Flahive was made subsequently thereto, to wit, on June* 14, 1889,

there does not appear to be any sufficient reason for disturbing the decision hereinbefore made in this cause. That decision was made upon the ground that the sale by Love to Rundall therein referred to operated as an estoppel to the assertion of claim by Love to the tract upon which were situated the Finley logs.

"And that being true, the fact that his application was made prior to that of Flahive could not inure to his advantage. If he were estopped from asserting rights under the applications simultaneously made with that of Flahive, he was unquestionably estopped from asserting rights under an application made two months previous."

(Record, p. 9.)

The error of the Secretary appears to us so manifest as to need no argument. Love could claim the land after the expiration of three months from Dec. 11, 1888, without a filing by Flahive, even assuming that the latter had the preferential rights during those three months. After March 11th, 1889, the land was open to the claim of any person who was in a situation to file, and if Love filed as early as April 5th, 1889, he was undoubtedly entitled to the land for that reason alone, the application of Flahive being unquestioned as being filed June 14, 1889.

Even assuming the alleged estoppel existed during the preferential period between December 11th, 1888, and March 11th, 1889, it ceased as soon as it ceased to protect Flahive. The land was after the latter date *publici juris,* and any qualified person could claim it, and Love would be in as favorable a position at least as a "next settler." We contend, however, that he stood in a more favorable position, as heretofore argued.

We do not find that this point has been passed upon by

this Court, but it was passed upon by the Supreme Court of the State of Montana in the case of McDermott Mining Co. vs. McDermott, 27 Mont. 150-151.

In that case, eliminating all questions of fraud, it was held that a locator of a mining claim who sold his interest under his location was not estopped, after a forfeiture by his vendee and the relocation by a third party, from purchasing from the relocator and setting up this title against his former grantee. That this principle is correct we believe cannot be doubted.

It therefore follows that the refusal of the Secretary to make a finding as to the date of filing was based upon an erroneous construction of the law. By his own language he conceived that the finding asked for would make no difference, "the fact that his application was made prior to that of Flahive could not inure to his advantage." (Record, p. 9.)

This brings us down to the consideration of the facts alleged concerning the date of filing, and the legal conclusions deducible therefrom.

It is well settled that if a Government officer charged with the duty of filing certain papers refuses to file a paper when the same is presented, and it is afterward determined that the person presenting it was entitled to have it filed at the time of such presentation, it will be treated as having been so filed.

The general rule is stated in Lytle vs. Arkansas, 9 Howard, 333:

> "It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his rights by the misconduct or neglect of a public officer, the law will protect him."

Shepley vs. Cowan, 91 U. S., 331, is a case which touches the one at bar at all four corners. It was there held that:

> "Where a party has settled upon public land with a view to acquire a right of preemption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale."

See also Duluth vs. Roy, 173 U. S., 590-1.

Ard vs. Brandon, 156 U. S., 537.

The Supreme Court of the State of Montana applied to this point the principle that upon questions of fact within its jurisdiction the decisions of the Land Department are final, and said that "what the evidence before them was does not appear." (Record, p. 21.)

What evidence was before it not appearing, it will be presumed that *all* the evidence was before it, including the endorsement upon the application showing its receipt April 5, 1889, as well as the order of the Commissioner reversing the action of the district land office in rejecting the application when so presented. The District Land Office must certainly be deemed to take notice of its own files, at least in the same case under consideration, and especially of the orders directed to it by the Commissioner of the General Land Office affirming or reversing the decisions of the local office upon appeal.

Ward's Heirs vs. Laborroque, 22 L. D., 229.

The principle being established by the cases cited that the date of presentation must be considered as the date of filing when necessary to protect the rights of a party, how else could that question be brought before this Court than as it is here presented? There being an unexplained finding by the Land Department as to the date of filing, according to the Supreme Court of Montana the question

of error would be buried, and the rights of the plaintiff shut out, not because he was not entitled to the land or that the error itself is not reviewable, but because the Land Department had intentionally or accidentally made its decision in such a manner that the point could not be afterward raised.

The allegations of counsel in Exhibit B, being a part of the complaint, are deemed to be re-alleged here, and for the purposes of the demurrer must be admitted. The complaint elsewhere alleges that the application was presented and sustained on appeal. (Record, p. 2.) This must also be admitted for the purposes of the demurrer. There being no finding of fact by the Land Department as to date of *presentation*, but only of *filing*, the former fact is open to proof, and if it is really as contended by counsel for Love, fairly and squarely raises the proposition of law heretofore repeatedly decided by this Court, that Love's application is entitled to be treated as filed April 5, 1889, that is, the date of presentation.

The error alleged does not come under the head of errors of law in determining the weight of evidence. The allegations of the complaint present two facts: First, that the application was in the hands of the Department April 5th, 1889, and by them rejected. Second, that on appeal, the right of Love to have his application filed upon the date he had presented it was established.

The question then raised is, did the Department err in finding the date of filing as of June 14, 1889, instead of April 5, 1889, as a matter of law?

We must assume upon the facts presented by the record that the Department found the date of filing upon the theory that the document was deemed filed only *at the date of presentation after the determination of the appeal.*

The question of law is undoubtedly properly before this

Court. The theory adopted by the Supreme Court of Montana makes the right to invoke the rule dependent upon accident; in fact, if it is the true theory, we are at a loss to know how the question could *ever* be brought before the court. When a finding is made as to the date of filing, unless the question may be raised as presented here, the error of the Department could never be reviewed.

If the question could not be raised as here presented, the rule could never have been established; as it would have been impossible to get it before this Court. The fact that the decisions in the cases cited were made is conclusive proof that the question can be raised.

The question is then narrowed down to this proposition: Assuming that Love's application *was* in the hands of the land officials on April 5, 1889, and that Flahive's application was filed on June 14, 1889, was Love entitled to the land? That the answer of this Court will be in the affirmative we see no reason to doubt.

If the application of Love is treated as filed April 5, 1889, Love's position is absolutely unassailable. His actual possession is shown. Let his claim date from 1882, from the date of his quarrel with Flahive in 1886, or from January 2nd, 1889, when he prepared his application, or as a settler on *surveyed* land on March 11, 1889; in any event his application made two months before Flahive gives him the land without the suggestion of a doubt. But as before argued, the findings of the land department establish his intention as well as other necessary facts as antedating Flahive's settlement, which is conclusive.

Nor could the delay in raising the question of filing make any difference. It was nearly six years after the applications of the parties were filed before the hearing as to the alleged sale was asked for and granted. The

land had been continuously awarded to Love until that time, and on Dec. 26, 1896, the question of filing was raised by Love. It does not appear that anyone was injured by the delay. The situation of the parties was still the same as at the date of the first hearing, and the contest was still pending. The question becoming, by the later rulings of the Department, material for the first time, was immediately insisted upon by Love.

Moreover, this being a Court of equity, the rights of the parties is the sole issue; and the plaintiff not being barred by any rule of practice, and it appearing that Flahive was not injured by the delay, it is plain that this question can now be considered without affecting prejudicially the rights of defendant in error. Further, the only ground Secretary Bliss gave for not granting the hearing upon that point was that the estoppel shut Love out regardless of the date of his filing.

We respectfully urge that for the purposes of this case the application of Love must be considered as filed as early as April 5, 1889, and that the patent should have gone to him upon that application.

Before closing this argument we wish to emphasize our first contention, to which we attach particular importance.

The findings of the district land office upon the first hearing, at which testimony was taken as to settlement, improvement, and continuous inhabitation with the intention *in good faith*, of appropriating the land described in the complaint as a homestead, were that *in all these respects Love had so complied with the law as to be entitled to the land, as against the claim of Flahive.*

That meant that Love's claim was *in esse* at the time Flahive attempted to settle, and continued to exist down

to the date of the hearing. Being in existence at that time, it matters not whether it was the same claim initiated in May, 1882, or a claim originating only the day before Flahive's settlement.

Even admitting all that the Land Department attempted to draw from the second hearing as to the suspension of his claim in 1883; yet in view of the findings that Love was entitled to the land as prior settler, against Flahive, and it being conclusively presumed that all the evidence as to *the existence of the claim at the date of the latter's settlement* was before the officers, the theory that Love disclaimed in 1883 has no weight.

At the second hearing there was no question raised as to the existence or non-existence of a claim by Love later than September, 1883; it being the theory of the Secretary that the disclaimer in 1883 precluded the subsequent assertion of a claim.

At the first hearing, when proof of the existence or non-existence of a claim by Love *at the date of Flahive's settlement was an issue*, and being the *only* hearing at which it was an isssue, and that question being vital to the claims of the parties, the finding in favor of Love upon that point is the rock against which all the later adverse rulings of the Department beat in vain, and upon which is founded the unquestionable right of this plaintiff in error to have his claim to the disputed land confirmed by this Court.

If Flahive could have proven at that hearing that Love was not claiming the land at the date he (Flahive) settled in 1884, the finding would have been different; but failing to show that, at the only time when the question was up, and the finding being that Love *was* claiming it at that time, without which finding the decision in favor of Love would have been impossible, there is no room for

doubt that Love's claim antedates that of defendant in error, and plaintiff must be given the decision.

The only showing that Flahive ever initiated a settlement upon any portion of the eighty in dispute is that he cultivated an acre or two of the unfenced twenty in 1885. That is all. That it is insufficient to establish a right of preemption is proved by the mere statement of the proposition.

Nor could he initiate a right to land in the possession of Love. Any attempt to do so would be a trespass, and no rights can be initiated by a trespass.

Atherton vs. Fowler, 96 U. S. 513.

It appears that the only ground upon which the land was given to Flahive was by virtue of the alleged sale.

The only findings in the record as to a claim by Flahive as against Love is contained in Exhibit A, page 7 of the Record. The Secretary said:

> "That Flahive himself worked for Love upon the fence that enclosed the land mentioned without making any claim whatever for any portion of it.
>
> "After survey in 1886, when Love attempted to complete his fencing for the north half of the north forty Flahive made threats of violence against him, he, Flahive, having in 1885, cultivated one or two acres of the land on the said forty outside of Love's enclosure."

The finding of the Secretary as to Flahive helping with the fence, being in view of all the evidence and of the claim of sale, would warrant the inference that his assistance had been rendered *after* the alleged sale; and if that is so, it follows without argument that there was a reassertion of claim by Love with the knowledge of Flahive, and

Love's rights are perfect. But this is merely cumulative, since the rights of Love have a solid foundation upon the points already discussed.

We respectfully submit that upon the record and the authorities, it appears that the Department had no authority to disturb the original findings of fact at the second hearing; that even admitting all that was contended as to disclaimer in September, 1883, the finding that Love claimed the land at the date of Flahive's settlement remains; and even if compelled to make his stand upon the final proposition that his application must be treated as filed April 5, 1889, Love is is equity and good conscience entitled to the land in dispute. His settlement upon the tract in 1882, before any other settlement appears to have been made there, entitles him to the most careful consideration of his case, and his early settlement and continued occupancy being admitted, all presumptions are in favor of his right to preempt the land.

This Court stated, in Tarpey vs. Madsen ,178 U. S. 215:

> "The law deals tenderly with one who, in good faith, goes upon public lands, with a view of making a home thereon."

The record shows the best of faith in Love in his settlement upon the land in dispute, and that he occupied it with the intention of making it his home. And we submit most earnestly that an examination of our argument and the authorities cited will convince this Honorable Court that his claim to the land must be sustained, and judgment rendered accordingly, and for all his costs and disbursements in this behalf expended.

Respectfully,

THOMAS C. BACH,

CHARLES EDMUND PEW,

Solicitors and Counsel for Plaintiff in Error.

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1906

No. 236

EDWARD H. LOVE,
Plaintiff in Error,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING,
Defendants in Error.

ARGUMENT OF PLAINTIFF IN ERROR UPON SUBMISSION OF CASE.

THOMAS C. BACH,
Solicitor and Counsel for Plaintiff in Error.

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Plaintiff in Error submits his case to this Court upon the brief heretofore filed by his Counsel, and upon the following printed argument. We have endeavored in this argument to present in as succinct and yet comprehensive a manner as possible our contentions; and we believe it will, when considered in connection with our brief, convey to this Court our theory of the case perhaps better than we could have done in an oral argument; and it will be doubtless less tiresome to the Court.

It will be unnecessary to reproduce here a detailed

statement of facts, but we refer to the statement containd in our brief, as well as to the argument and authorities therein found, in connection with the points urged here.

ARGUMENT.

This case may be briefly stated as follows:

Plaintiff in error having filed his application with the local land office at Helena, Montana, to enter the E. ½ of the N. E. ¼ of Section 27 and the E. ½ of the S. E. ¼ of Section 22, Tp. 20, N., R. 26 W., in Missoula County, Montana, under the preemption and homestead laws, one Michael Flahive contested his right to enter the E. ½ of the S. E. ¼ of Sec. 22, claiming the land himself.

On August 14th, 1890, a hearing was had at the land office in Helena to ascertain which contestant was the prior settler. (Record, p. 3). It was there decided that Love was the prior settler and he was accordingly awarded the land.

Upon appeal to the Commissioner of the General Land Office that decision was affirmed, with the statement "that it is evident from the testimony that Flahive has no right whatever to any portion of the E. ½ of the S. E. ¼ of Section 22, Tp. 20 N., R. 26 W., as against the claim of Love." (Record, p. 7).

This latter decision was affirmed by the Secretary of the Interior on Feb. 12, 1894. (Record, p. 7-8). The effect of that affirmation was to establish the fact that *Love was upon the disputed land and claiming it under the preemption law at the time Flahive attempted to initiate a right in October*, 1884, and Love's right to the 160 acres of land described in the complaint thereupon

became vested. No proceeding was ever instituted for the purpose of setting aside those findings as erroneous.

It has been decided by this Court in Noble vs. Union River Logging R. R. Co., 147 U. S. 176, that where land had been awarded to a person by the Secretary of the Interior, that person "became at once vested with a right of property in those lands of which they can only be deprived by a proceeding taken directly for that purpose", and that "a revocation of the approval of the Secretary of the Interior * * * by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."

So that so long as these findings were not reopened in a proceeding instituted for that purpose, the only question to be considered is whether Love had made a sale which was sufficient to transfer through Rundall to Flahive his right of entry; and that is a question for the Courts. And the decisions of this Court have firmly established the rule that no sale made before entry will transfer such right. (Sec. 2263 U. S. R. S. Also see cases cited in our brief, pp. 24-25). This is true even though Love had made a sale of his own land as such. How much more is it true when we consider that the most which is claimed is that he sold some land or logs for Finley.

There could be no estoppel by deed. There was only a verbal sale of the logs. No interest in the land could be transferred because the title was in the government. The only right any person could at that time acquire was that of possession, and that depended upon the actual personal occupancy by the claimant.

Moreover, there being no writing, and the statute of frauds being in force in Montana at that time, the

transaction was insufficient to convey any interest in the land.

Section 160 of the General Laws of Montana Territory of 1879, page 435, provided that "No estate or interest in lands * * or in any manner relating thereto shall hereafter be created, granted, assigned, surrendered or declared, unless by operation of law, or by deed or conveyance in writing subscribed by the party * * or by his lawful agent * *"

The only property Finley or his agent could sell was the improvements, but the right of preemption did not go to the purchaser of the improvements (Sec. 2263 U. S. R. S). Also Quinby vs. Conlan. 104 U. S. 420). The right of preemption could be acquired only by personal settlement; and if the land was open to settlement the qualified person who first got possession and otherwise complied with the law was entitled to it. And Love was found to be the prior settler.

It appears that Rundall never acquired any right to the disputed eighty. He settled upon and preempted the *Northeast* Quarter of Section 22. (P. 12 of Record, Cross Ex. of Rundall. Also witness Merritt, p. 13). Besides, he is not in this controversy. The issue in this case is between Love and Flahive, and each must stand upon his own settlement and compliance with the law. In that Love has been determined to be prior to Flahive, and that is conclusive.

There could be no estoppel upon the facts as they exist. If Love sold Finley's logs, the purchaser got the logs and the matter ended there. To give the sale the force given it by the Department it must have been sufficient to transfer the right of preemption; and that proposition is met squarely by Section 2263 U. S. R. S. which declares such a transfer void. There is no

estoppel under a void sale, and under the facts as presented here there was no estoppel *in pais*. Flahive was bound to know the law; and the fact of Love's possession of the tract and that Flahive assisted him in fencing it eliminates the question of estoppel *in pais*.

Miller vs. Tex. and Pac. Ry. Co., 132 U. S. 662.
McLaughlin vs. United States, 107, U. S. 528.

Flahive moreover stood by until 1886 before disputing Love's right to the tract in controversy.

It is firmly established (See our brief, pp. 33-34) that the right of preemption dates from the date of settlement by the claimant himself, and that the question of priority is a question of fact and not of law. When the department decided that Love was the first settler as a matter of fact, that was conclusive.

If this Court find that there was no estoppel, it is decisive of the case in Love's favor. Patent would have issued to him but for the error of the Department in adopting the theory of estoppel, and if that error is rectified, Love is entitled to judgment without going further.

The sale as evidence of disclaimer or abandonment in Sept. 1883, can of course have no effect in the face of the finding that a year later, at the time Flahive settled, Love was upon the disputed land, claiming it under the pre-emption law. It will be observed that Secretary Frances in his letter of Dec. 26th, 1896, (p. 15 of Record) based his decision solely upon the theory that the sale was evidence of a disclaimer in 1883, and that Love was therefore estopped from thereafter asserting a claim to the land.

This is clearly erroneous; and we will pass on to another point which we consider vital.

The case of Johnson vs. Towsley, 13 Wall. 72, establishes the principle that the original settler upon unsurveyed land does not lose his right absolutely by failure to file within the three months allowed, but can be shut out only by a settlement and *prior* filing by another.

The Act of May 14th, 1880 (21 Statutes at Large, p. 140) extended the operation of Sections 2265 and 2266 to settlers upon *surveyed* lands and of course it carried with it the construction placed upon those sections in Johnson vs. Towsley supra.

At the expiration of the three months preference period, or on March 11th, 1889, Love, who was then in *actual* possession of sixty acres of the disputed land, and in *constructive* possession of the remaining twenty acres, became a settler upon *surveyed* land. His right related back to the date of his original settlement, under the provisions of Section 3 of the Act of May 14, 1880. His settlement antedating that of Flahive, he was first in right and under simultaneous filings was entitled to the land, Flahive having failed to file within the three months allowed the preferred settler.

Even assuming that Flahive acquired rights by the sale, they were all lost when he permitted the three months to elapse without a filing; for the alleged superiority of defendant's right is based upon the alleged sale. The estoppel would not in any event continue longer than it protected Flahive.

The parties would then rest upon their respective settlements, and the department held, as above set forth, that upon the question of priority of settlement, Love's rights were superior to those of Flahive.

It thus appears that the only theory that would shut Love out would be that of perpetual estoppel, which of

course connot be seriously entertained. Even conceding, (which we do not) that Flahive acquired by the transaction some right in the land; when the preferential period passed without a filing by him, whatever right he did acquire died. And when he lost that, he had nothing upon which to base his claim. Love was in actual possession, and the findings conclusively show that even conceding (which we do not) that he did not have the intention of making it his homestead in 1883, yet he did have that intention before Flahive settled in October, 1884. And that intention being in existence when Flahive settled, the latter could acquire no right to the eighty in dispute as against Love. (Hosmer vs. Wallace, 97 U. S. 575.)

When, therefore, the three months from December, 11th, 1888, passed without a filing, Love's actual possession from a date prior to any attempted settlement by Flahive, made him again the original settler upon surveyed land, and under simultaneous filings he was entitled to the land.

We will briefly touch upon the last point urged in our brief, which we contend is sufficient to warrant a reversal.

It appears that Love prepared his application and presented it to the local officers for filing but that it was rejected on April 5th, 1889, on account of the claim of the Northern Pacific Railway Co. The action of the local officers in rejecting the application was reversed upon appeal to the commissioner, and Love's application re-instated (See record Page 2). The local officers however fixed the date of filing as June 14, 1889.

The Supreme Court of Montana held that the question of *filing* was a question of fact, and that the finding of the land department that Love's filing was made

on June 14, 1889, simultaneously with that of Flahive, was binding upon the Courts.

This however is clearly erroneous. The date of filing within the contemplation of the land officials was the date when it was accepted by them and became a part of the files of the office. There was no finding as to when the application was first *offered* for filing. The complaint alleges that it was tendered as early as April 5th, and was refused filing by the land officials upon the ground that the land was not open for entry by him.

Upon appeal from the refusal of the local office Love's right to have his application filed at the time he presented it, to-wit, as early as April 5, 1889, was established.

This clearly presents the question of law, did the Supreme Court of Montana and the Land Department err in not treating the application as filed on the date of its first presentation, or April 5, 1889, instead of as filed on the date of its acceptance after the determination of the appeal?

Looking to the decisions of this Court (Lytle vs. Arkansas, 9 Howard, 333; Shepley vs. Cowan, 91 U. S., 331, and other cases cited in our brief, pp. 41 and 42), we find that the principle has been irrevocably laid down that if a person tenders his application to the proper officer for filing, and the latter refuses to file it, the rights of the applicant cannot be permitted to suffer by such refusal if it appears that he was entitled to have his application filed on the date when so presented.

The facts alleged in the complaint bring the question of law squarely before this Court. If as a matter of fact the application was presented as early as April 5th,

Love was undoubtedly entitled to have it treated as filed on that date. We allege that it was so presented and the facts alleged being taken as true for the purposes of the demurrer, the question of law is before this court. And this Court has decided the question so frequently and clearly that there is no escape from the conclusion.

It seems clear that the Land Department had no authority to take any further action after the question of settlement, inhabitation and improvement had been finally decided in Love's favor. The alleged sale could not be considered as evidence of a disclaimer or abandonment, except in a rehearing upon all the questions of fact, and as before repeated, no such rehearing was ever had.

The legal question was for the Courts; and all findings upon the question of the sale by the Land Department were without jurisdiction and must be disregarded.

But as we contend, the sale could not, either in its legal aspect or as evidence, affect the findings that Love was a claimant and complying with the law in October, 1884, with his claim in existence and perfected at the time Flahive appeared as a settler.

To give the sale the effect contended for by the defendants in error would be to limit the power of Congress to dispose of the public domain. The law of Congress (Sec. 2273 U. S. R. S.) provides that "when two or more persons settle on the same tract of land *the right of pre-emption shall be in him who made the first settlement*, provided such person c nforms to the other provision of the law; and all questions as to the *right of pre-emption* (i. e., who made the first settlement and otherwise complied with the law) arising between dif-

ferent settlers shall be determined by the register and receiver," etc.

That section expresses the will of Congress as to how the unsurveyed public domain should be disposed of, and that question being decided in favor of Love, what authority had the Land Department to defeat its operation by a far fetched legal conclusion as to the effect of a sale of some logs by Love as agent for one Finley to a person who is not a party to this controversy? The essential facts had been disposed of in Love's favor and nothing was left but to issue the patent to him. It was found that Love settled upon a strip of land a mile long and a quarter of a mile wide, and that he was in possession thereof at the time Flahive settled in October, 1884, having improvements thereon, and that he at that time had the intention of making it his homestead. That strip of land proved after survey to be the East half of the Northeast quarter of Section 27 and the East half of the Southeast quarter of Section 22, Tp. 20 N., R. 26 W. There was no pretense that he attempted to sell any of his rights in and to that land; and that being the case, the Department had authority only to issue patent to him upon those findings. This is the case in a nut shell. We have however discussed it from every possible standpoint in order that the ground might be fully covered if this Court should see fit to go into those questions. And viewed from any standpoint we feel that under the law and the authorities we are entitled to a reversal of the judgment.

In taking the position that the alleged sale, if it really took place, was null and void so far as it purported to affect the right of pre-emption, we do not wish to be understood as repudiating any sale which was really made. Our contention is that no matter what sale may

have been made in 1883 it created no estoppel against the subsequent assertion of a claim by Love should the land become *publici juris*. Our position is made safe however by the fact that Love was in continuous possession of the land and that no rights were initiated which are prior to his.

It seems somewhat absurd to us to be compelled to go to such length to discuss the sale as though it purported to convey any of Love's rights. The only contention that was at any time made before the Land Department was that Love sold something for one Finley. We can not see how the theory could be seriously entertained for an instant that Love's actual rights could be thereby affected in the slightest degree. The issue is between him and Flahive and neither the rights of Finley nor of Rundall have any bearing. The parties to this proceeding must base their respective rights upon their compliance with the law.

Rundall never made any settlement upon the 80 in dispute, and if he had done so, he could not transfer his right of pre-emption to Flahive, to the prejudice of Love, who was in possession and asserting a claim (Quinby vs. Conlan, 104 U. S., 420).

However, the Department denied Love's right upon the ground of that transaction and we have been compelled to argue the case upon all sides.

The proposition seems unreasonable to us viewed from any position. Suppose the contention were that Love sold his own rights. This Court will take judicial notice of the fact that $20.00 is a pitiful sum to accept for an inchoate right to 80 acres of valuable land. Also, if the fence was upon it at that time, there was a mile and a quarter of fence. No attempt was ever made, however, to claim the fence.

If, however, the fence was not upon it at that time, then Flahive must have helped Love to build it after the alleged sale; and in that event he is estopped from denying Love's right to the land.

Viewed from any standpoint, we submit that Love is entitled to judgment in his favor.

The plaintiff is the prior settler upon the land, and should be given the benefits guaranteed by Congress to the pioneer, unless it appears that he has knowingly and intentionally parted with his rights; and we feel confident that the decision of this Court will be that he has not.

Upon the record and upon our brief and this argument, and with full faith in the justice and equity of his cause, the plaintiff in error submits it to the conscience of this Honorable Court, upon whose decision depends the final vindication of his rights in the premises.

Respectfully submitted,

THOMAS C. BACH,
Attorney for Plaintiff in Error.

CHARLES EDMUND PEW,
Of Counsel.

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SUPREME COURT U. S.

No. 286

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1906

EDWARD H. LOVE,
Plaintiff in Error

vs.

ANNIE FLAHIVE and
ANDREW J. LANSING,
Defendants in Error

PETITION FOR REHEARING

C. B. NOLAN,
Attorney for Plaintiff in Error.

C. E. PEW,
Of Counsel.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1906

EDWARD H. LOVE,
Plaintiff in Error

vs.

ANNIE FLAHIVE and
ANDREW J. LANSING,
Defendants in Error

PETITION FOR REHEARING.

Comes now the Plaintiff in Error and respectfully petitions this Honorable Court for a rehearing in the above entitled cause upon the following ground:

That the Court misapprehended the facts in assuming that the sale was made during the pendency of the proceedings in the land office and after application had been made to

enter the land; while it appears from the record that the sale took place in September, 1883, and the first proceedings were had in the land office in 1889.

This Court, in its opinion filed March 25, 1907, after touching upon the question of the jurisdiction of the Land Department, states that "This brings us to the pivotal fact It appears from the complaint and the exhibits that during the time that these proceedings were pending in the Land Department, Love made a sale to James Rundall of the tract in controversy," etc.; and upon that assumption disposed of the case without considering several of the points urged by the plaintiff.

The Court has thus inadvertently based its decision upon a wrong premise. The sale was made in September, 1883, six years before the applications were filed. The synopsis of the testimony found at pages 10 to 15 of the record, embodied by the Secretary in his letter of December 26th, 1896, in lieu of findings, clearly shows that.

Vanderpool testified that he had a conversation with Love about the sale in August, 1883. (Page 11 of Record).

Lynch testified that he was present at the conversation between Love and Vanderpool in 1883. (Page 12 of Record).

Rundall testified that in the fall of 1883 he bought the piece of land, etc. (Page 12 of Record).

Love testfied that he sold the logs to Rundall in September, 1883. (Page 13 of Record).

It appears in the findings of the Commissioner of July 26, 1892 (Page 7 of Record), that Flahive settled on the land adjoining the disputed eighty in October, 1884, over a year after the sale to Rundall, making his first claim as against Love in 1886, when the latter attempted to extend his fence over the remaining twenty acres thereof. The complaint also alleges (page 2 of Record) that the land was surveyed in 1888 and in 1889, six years after the alleged sale, both parties filed applications to enter.

At no stage of the proceedings, either in the Land Department or in the courts, has this statement of facts been questioned, nor has it been claimed that any other sale was made than the one taking place in September, 1883.

Our contention is, as will fully appear from our briefs, that, even admitting a disclaimer in 1883, it did not prevent Love from afterward making a valid settlement, at least as against any one but Rundall, and Rundall is not in this controversy. The theory of the Land Department, however, was that the sale by Love in 1883 created an estoppel which prevented him from afterward claiming the land, even as against a third party. (Record pages 8 and 9). Upon this theory the land was awarded to Flahive as next settler.

A disclaimer in 1883 did not prevent a subsequent settlement upon the same land if it remained or became open for

settlement. And the findings of the Land Department, which have never been disputed, are that Love was upon the land and complying with the law at the time Flahive attempted to settle a year after the sale, or in October, 1884, and nearly five years before the proceedings were instituted in the Land Department.

Love being in possession and claiming the land, the sale by Rundall, who was out of possession, to Flahive, who was also out of possession, could not give the latter superior rights under a subsequent settlement.

Stone vs. Cowles, 15 L. D., 192.
McGowan vs. McGann, 15 L. D., 542
Moss vs. Dowman, 176 U. S., 416, 417.

Every time the land was left vacant, all previous rights were extinguished, and the next person taking possession initiated a new right. Love was in possession and complying with the law when Flahive first tried to settle, no relinquishment was thereafter made by Love, and he maintained his possession down to the filing of the complaint herein. This being so, it makes no difference between the parties here what may have taken place a year previous to Flahive's settlement.

Rundall, who claimed to have purchased from Love, not being in this controversy, the question is simply one of priority as between Love and Flahive, and the uncontradicted findings of the Land Department are that Love was ahead of Flahive.

The Court also appears to have misunderstood our position as to the action of the Land Department in reference to its former findings.

We, of course, recognize the fact that until patent has issued, the Land Department has jurisdiction to correct the findings to conform to the facts; but when that is done, it must issue patent accordingly. Our complaint in this case is that after they found that Love was a *bona fide* settler in 1884, when Flahive attempted to settle, they refused to issue patent accordingly, but notwithstanding those facts were undisputed, awarded the land to Flahive on the strength of the sale in 1883. This was error, as the sale in 1883 could have no bearing upon the *bona fides* of his settlement a year later; and the finding that he was a *bona fide* settler a year later was conclusive.

We fully concur with the views expressed by the Court upon the legal points decided by it; and they are in harmony with our other contentions, when the inquiry is premised upon the correct statement of the facts exhibited by the Record.

We have devoted so much labor and thought to this case and are so firmly convinced that our cause is supported by both reason and authority, that we have availed ourselves of the benefit of the rules of this Court and file this petition for a rehearing; and the Court having inadvertently based its decision upon the erroneous assumption that the sale was made *after* the application had been made to enter the land

and during the pendency of the proceedings in the Land Department, instead of *six years before the filing of the applications*, and that fact being, as the Court states, vital to the case, we submit that the rehearing should be granted.

Respecfully submitted,

C. B. NOLAN,

Attorney for Plaintiff in Error.

C. E. PEW,

Of counsel.

I, C. B. Nolan, the Attorney for Plaintiff in Error, do hereby certify that the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

C. B. Nolan

FILE COPY.

FILED.
MAR 7 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 236.

EDWARD H. LOVE, Plaintiff in Error,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Flahive.

WOODY & WOODY and
ELMER E. HERSHEY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1906.

EDWARD H. LOVE,
Plaintiff in Error.
vs.
ANNIE FLAHIVE AND ANDREW J. LANSING.
} No. 236.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

STATEMENT.

This is a suit in equity, originally brought by the plaintiff in error in the District Court of Missoula County, Montana, to have the defendant Flahive held as trustee for plaintiff of the legal title of certain lands described in the bill.

Demurrer was filed for want of facts sufficient to constitute a cause of action which was sustained by the Court and judgment entered on motion of the plaintiff on the complaint and demurrer.

On appeal, the Supreme Court of Montana affirmed the judgment of the District Court, and the case comes before this court upon a writ of error to that court.

The plaintiff based his complaint upon what he alleged was an erroneous finding of facts and decision of the Sec-

retary of the Interior in a contest between Annie Flahive and himself, wherein each asserted a right to the land by reason of priority of settlement. In the final decision of the Department, which is complained of, it was held that the plaintiff Love, by his sale of the land or of the improvements thereon to one Rundall, and his failure to assert title or claim when in a subsequent controversy between himself and Flahive, Rundall, who was present, told Love that he had bought the land from him was proof that he had abandoned his claim to it and that he would not thereafter be permitted to deny the sale and assert title under his original settlement, as against Flahive, the Grantee of Rundall, Patent subsequently issued to Flahive.

ARGUMENT.

To entitle a party to relief in equity against a patent of the government, he must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent. It must appear that, by the law properly administered, the title should have been awarded to the claimant.

Sparks vs. Pierce, 115 U. S., 408.
Bohall vs. Dilla, 114 U. S., 47.
Lee vs. Johnson, 116 U. S., 48.

It is also well settled that the Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition is conclusive everywhere else.

Lee vs. Johnson, 116, U. S., 48.
Johnson vs. Towsley, 13 Wall., 72.
Warren vs. Van Brunt, 19 Wall., 646,
Shepely vs. Cowan, 91 U. S., 330.

Moore vs. Robbins, 96 U. S., 530.
Marquez vs. Frisbie, 101 U. S., 473.
Vance vs. Burbank, *Id.*, 514.
Quinby vs. Conlan, 104 U. S., 420.
St. Louis Smelting and Refining Co. vs. Kemp ("Smelting Co. vs. Kemp"), *Id.*, 636.
Steel vs. St. Louis Smelting and Refining Co., 106 U. S., 447.
Baldwin vs. Starks, 107 U. S., 463.
United States vs. Minor, 114 U. S., 233.

There is no question of the jurisdiction of the Department in this case. Neither is there any charge of fraud or imposition, but at most it is claimed there was a misapplication of the law to the facts; but this claim, we think is untenable for the reason that it seems to us the only question involved in the controversy as finally decided by the Secretary, was one of fact, pure and simple.

With all of the evidence before him, taken at a hearing, the Secretary decided that:

> "It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case (whether the sale was of the logs or of the land), Love asserted no title."

From which statement of facts he held:

> "This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him." (Record, p. 15.)

This ruling of the Department that the sale by Love of the claim, or even of the improvements on the land was an abandonment of all right under his settlement is in harmony with previous decisions of the Department. This was held as early as the case of Weber vs. Sahppell, 9 Copps, L. O., 131, and by Secretary Teller in Houston vs. Coyle, 2d L. D., 58. Again in Dashney vs. Pagganer, 27 L. D., 319, Secretary Bliss held:

> (Syllabus) "The presumption of abandonment attendant upon the sale of improvements on a tract of public land, cannot be overcome by a showing that such sale was procured through a fraud upon the rights of the vendor, where a third party, acting upon the evidence of such sale, in good faith thereafter purchases said improvements and makes entry of the land."

In the case of Potter vs. Hall, 189 U. S., 292, in which the question was whether Potter's entry made before he went outside of the line to take part in the race at the opening in Oklahoma, gave him an unauthorized advantage, after reciting the facts, Mr. Justice White speaking for the Court said:

> "It follows that the final conclusion of the Department that no such advantage resulted involved but the finding of an ultimate fact, and not a conclusion of law, and it is therefore not reviewable. If the facts found by the Secretary had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise, but such is not the case."

So, in the case at bar, the fact that Love had sold his right to the land was held as conclusively proven against him by his refusal to deny it when asserted by Rundall in his presence and in the presence of Flahive. From which fact the Secretary concluded, if he ever had any claim to

the land he had abandoned it. That this fact found by the Secretary tends to sustain his finding of an "ultimate fact," viz., that of abandonment, will not be disputed. So, in any view of the case, it is the finding of facts that was in issue and that is not reviewable.

In the case of Quinby vs. Conlin (104 U. S., 14 Otto, 420), Mr. Justice Field speaking for the court, said:

> "And we may also add in this connection, that the misconstruction of the law of the officers of the Department, which will authorize the interference of the court, must be clearly manifest and not alleged upon a possible finding of the facts from the evidence different from that reached by them."

JURISDICTION TO MAKE THE FINDING IN QUESTION.

But, counsel for plaintiff in error insist that the Department was without jurisdiction to order the hearing of March 29, 1895, to take testimony on the question of the sale by Love of his right to the land. They base their contention on the case of Noble vs. Union River Logging Railroad, 147 U. S., 176.

We do not think the doctrine of that case has any application here. In that case it was held that under the peculiar language of the first section of the right of way act of 1875, the right of way was vested in the R. R. Co., when the Secretary decided the company was entitled to the right of way under the statute and noted his approval upon the plats, and that as it was a vested right the successor of the Secretary could not divest the Company of its property. Will it be contended the Secretary has no power to grant a motion for review or rehearing in a contest case involving only the priority of right between two claimants for a tract

of land? This is the effect of the contention of counsel, unless it is insisted that the purpose for which the hearing was held was immaterial, which question we have already discussed. We think it is settled that the Secretary has jurisdiction at any time prior to the issuing of patent to cancel any entry. He also has jurisdiction to order a hearing for the purpose of obtaining the facts to enable him to determine, in a contest case, whether either claimant, and if either, which one, has the better right, and in doing so he may overrule any and all other decisions theretofore made.

Michigan Land and Lumber Co. vs. Rust, 168, U. S., 589. Beley vs. Napthaly, 169 U. S., 353. Knight vs. U. S. Land Association, 142 U. S., 161. Brown vs. Hitchcock, 173 U. S., 473. Hawley vs. Diller, 178, U. S., 476. Harkrader vs. Goldtein, 31 L. D., 87.

In the case of Knight vs. U. S. Land Asso., *supra,* the court held:

> "It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done * * * takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government which is a party in interest in every case involving the survey and disposal of the public lands."

The distinction between cases like the one at bar and the Union Logging Railroad Co.'s case was clearly pointed out by this court in the case of Beley vs. Naphtaly, *supra,* wherein the court, after referring to the Stone case, said:

"Neither does Noble vs. Union River Logging Railroad Co., 147, U. S., 165, touch the case. The principle therein decided was in substance the same as in the Stone case, *supra*. The control of the Department necessarily ceased the moment the title passed from the Government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted."

But, counsel argue that as the sale by Love was null and void it could give rise to no equities between the parties.

The Secretary, in his final decision, emphasizes the position that Rundall took no title by the sale of Love to him, nor did Flahive by the sale of Rundall. But, that it was an abandonment by Love of all claim to the land. The distinction is obvious.

Again it is insisted that if the effect of Love's sale to Rundall was an abandonment, then Rundall's sale to Flahive was also an abandonment and let in Love's reasserted claim.

It seems to us counsel totally misapprehend the effect of the Secretary's decision. It may be agreed, that as Love's sale to Rundall was an abandonment to Rundall of his claim, so was Rundall's sale to Flahive an abandonment by him to Flahive of his claim. But, just how that could let in Love's abandoned claim we are unable to see.

Neither was there any *reasserted claim* by Love as referred to by counsel. It is only necessary to say that no attempt was made to show there was any reasserted claim. On the contrary, at the last hearing, Love still maintained

and swore that he had made no sale of the land to Rundall. It follows that there could have been no intention of following his abandonment by reasserting a claim. It is totally inconsistent with his contention in the Department and at variance with his testimony at the last hearing. For, although Rundall, Neptune, Lynch and Thomas, all swore to facts showing his sale to Rundall, he swore: *"Did not sell land to Rundall."* (Record, p. 13.) This being the case, there can be nothing in the contention that because Flahive did not file within three months from the date of the filing of plat in the local office, she forfeited her rights. The Government will take no advantage of this and it is only the next settler who complies with the law to whom her claim could have been forfeited. And as we have seen, Love having abandoned his claim he was not the next settler as contemplated by the statute. Moreover, Love could claim no advantage over Flahive in the matter of asserting claim to the land by filing, for, as held by the Supreme Court of Montana, the complaint does not allege the date of filing application by Love. The allegation of the complaint on this point is as follows:

> "That on the second day of January, 1889, and within the time required by law therefor, the plaintiff for the purposes hereinbefore stated duly made and executed the necessary affidavit and application to enter said land and obtain a patent therefor, and with that intention delivered the same to the officers of said local Land Office." (Record, p. 2.)

The best that could be claimed for him is that, as found by the Department, the filings were simultaneous and were made June 14, 1889. And as Love had abandoned his claim and made no new settlement after such abandonment in 1883, he had no right to assert, because of settlement or residence, and the land was properly awarded to Flahive.

McCalla vs. Acker, 29 L. D., 203, and cases there cited.

It follows that the decision of the Supreme Court of Montana was correct upon all the points involved in the assignment of errors in this court by the plaintiff in error, and should be in all things confirmed.

Respectfully submitted,

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Flahive.

WOODY & WOODY and
ELMER E. HERSHEY,
Of Counsel.

Supreme Court of the United States.

No. 236.—October Term, 1906.

Edward H. Love, Plaintiff in Error, vs. Annie Flahive and Andrew J. Lansing. } In error to the Supreme Court of the State of Montana.

[March 25, 1907.]

On December 3, 1900, Edward H. Love commenced this suit in the District Court of Missoula County, Montana, to have Annie Flahive, the holder of the legal title to a specified tract in that county, adjudged to hold it in trust for him. A demurrer to the complaint was sustained by the District Court and, no amendment being asked, judgment was entered for the defendants. This judgment was affirmed by the Supreme Court of the State, (83 Pac. Rep. 882,) from which court the case was brought here on writ of error.

The facts, as stated in the complaint and attached exhibits, are that plaintiff, with the purpose of entering the land as a homestead and being qualified therefor, in May, 1882, settled upon, occupied and fenced the entire tract, with the exception of the north twenty acres thereof. In addition to a controversy in the Land Department with the Northern Pacific Railroad Company, which claimed the land under its grant, but whose claim was finally rejected, he had a contest in the Land Department with Michael Flahive, who was also seeking to enter the land, which, after several hearings before the local land officers, with appeals to and decisions by the Commissioner of the General Land Office and the Secretary of the Interior, resulted in a final decision against him and an award of the land to the defendant Annie Flahive, the widow of Michael Flahive, who had died pending the proceedings. In pursuance of that award a patent was issued to her in December, 1899.

Mr. Justice Brewer delivered the opinion of the Court.

Plaintiff rests his case on the contention that in the conclusions of the Secretary of the Interior there was error in matter of law, inasmuch as it is well settled that in the absence of fraud or imposition the findings of the Land Department on matters of fact are conclusive upon the courts. *Johnson* v. *Towsley*, 13 Wall. 72; *Lee* v. *Johnson*, 116 U. S. 48; *Lake Superior &c. Co.* v. *Cunningham*, 155 U. S. 354, 375; *Burfenning* v.

Chicago, St. Paul &c. Railway, 163 U. S. 321, 323; *Gonzales* v. *French,* 164 U. S. 338; *Johnson* v. *Drew,* 171 U. S. 93, 99.

He also invokes the authority of *Noble* v. *Union River Logging Railroad,* 147 U. S. 176, to the effect that when by the action of the Department a right of property has become vested in an applicant it can be taken away only by a proceeding directly for that purpose, and contends that his right to the land was determined by certain findings of the Commissioner of the General Land Office on July 26, 1892, affirmed by the Secretary of the Interior on January 12, 1894. It is doubtless true that when once a patent has issued the jurisdiction of the Land Department over the land ceases, and any right of the Government or third parties must be asserted by proceedings in the courts. *United States* v. *Stone,* 2 Wall. 525, 535; *Michigan Land & Lumber Company* v. *Rust,* 168 U. S. 589, 593, and cases cited. It may also be conceded that a right of property may become vested by a decision of the Land Department, of which the applicant cannot be deprived except upon proceedings directly therefor and of which he has notice. *Cornelius* v. *Kessel,* 128 U. S. 456; *Orchard* v. *Alexander,* 157 U. S. 372, 383; *Parsons* v. *Venzke,* 164 U. S. 89; *Michigan Land & Lumber Company* v. *Rust, supra.* Without undertaking to indicate the limits to which this can be carried, it is enough to say that the proceedings in this case, both in the local land offices and by appeals and reviews in the General Land Office, were within the settled rules of procedure established by the Department in respect to such matters. Generally speaking, the Land Department has jurisdiction until the legal title has passed, and the several steps in this controversy were before the issue of the patent, while the jurisdiction of the Land Department continued, and with both parties present and participating. The question of title was in process of administration and until the patent issued nothing was settled so as to estop further inquiry. *Knight* v. *U. S. Land Association,* 142 U. S. 161; *Michigan Land & Lumber Company* v. *Rust, supra.* So, although it be conceded that the findings of the Secretary of the Interior, in 1894, were to the effect that the plaintiff had a right to enter the land, that decision was not final, and it was within the jurisdiction of the Land Department to institute further inquiry, and upon it to finally award the land to the party held to have the better right.

This brings us to the pivotal fact. It appears from the complaint and exhibits that during the time that these proceedings were pending in the Land Department, Love made a sale to James Rundall of the tract in controversy, or some other tract, or some logs, and that Rundall thereafter made a sale of the same property to Flahive. What was the thing sold is not positively shown by the testimony. In the final decision of the case

the Secretary of the Interior, after giving a synopsis of the testimony, which he says is largely incomplete and irrelevant and not entirely satisfactory upon the question, says:

"The witnesses Vanderpool and Lynch testify that Love had a place for sale which included the tract in controversy; Rundall that he purchased the tract in controversy from Love. The latter denies any sale of the land, but states that he sold some logs for W. H. Finley. It is evident from Love's statement of the transaction that, conceding the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. H. Finley, upon which the logs were situated, was about to be taken by Rundall.

* * * * * *

"It appears that a clear preponderance of the testimony shows that the logs were situated upon the land in controversy; and from Love's evidence it is shown that he at the time of this sale laid no claim to the land upon which this unfinished cabin was erected.

* * * * * *

"It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case Love asserted no title. It matters not, under the peculiar circumstances of this case, whether Love sold his own land or the land of W. H. Finley, or simply logs; as in the first instance it would work an estoppel of the assertion of claim now, in the second it would be conclusive evidence that the land was not claimed by him, and in the third it would be equally evidence of the same fact, as from his own testimony it appears that he laid no claim to the land upon which the logs were situated.

"This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive, did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted, at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him.

"The decision appealed from is therefore affirmed and the application of Love to enter the tract in controversy is held subject to the rights of Annie Flahive, the widow of Michael Flahive."

Of course, whether there was a sale, and what was the thing sold, were matters of fact to be determined by the testimony, and the findings of the Land Department in that respect are conclusive in the courts. It is objected by the plaintiff that a sale of a homestead prior to the issue of patent is void under the statutes of the United States. *Anderson* v. *Carkins*, 135 U. S. 483. This is undoubtedly the law, and the ruling of the Secretary was not in conflict with it, but the fact that one seeking to

enter a tract of land as a homestead cannot make a valid sale thereof is not at all inconsistent with his right to relinquish his application for the land, and so the Secretary of the Interior ruled. While public policy may prevent enforcing a contract of sale, it does not destroy its significance as a declaration that the vendor no longer claims title. He cannot sell and at the same time deny that he has made a sale. The Government may rightfully treat it as a relinquishment, an abandonment of his application and entry. No man entering land as a homestead is bound to perfect his title by occupation. He may abandon it at any time, or he may in any other satisfactory way relinquish the rights acquired by his entry. Having done that, he is no longer interested in the title to the land. That is a matter to be settled between the Government and other applicants. In this case, Love having relinquished his claim, it does not lie in his mouth to challenge the action of the Government in patenting the land to Mrs. Flahive.

We see no error in the record, and the judgment of the Supreme Court of Montana is

Affirmed.

Mr. Justice WHITE took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 236.—October Term, 1906.

Edward H. Love, Plaintiff in Error, vs. Annie Flahive and Andrew J. Lansing. } In error to the Supreme Court of the State of Montana.

On Petition for Rehearing.

[May 27, 1907.]

Mr. Justice Brewer delivered the opinion of the Court.

A petition for rehearing calls our attention to a misstatement in the opinion. We said that "it appears from the complaint and exhibits that during the time that these proceedings were pending in the Land Department, Love made a sale to James Rundell," etc. The facts are that in May, 1882, Love settled upon and occupied the tract in controversy with the purpose of entering it as a homestead; that the land was then unsurveyed public land; that it was not surveyed until 1888, and that on January 2, 1889, plaintiff for the first time filed in the land office an application for an entry. It further appears that the sale to Rundell was made in September, 1883, after the original settlement by the plaintiff, while the land was unsurveyed and before the application to enter. Hence it is not strictly true that while "proceedings were pending in the Land Department, Love made a sale," for there was nothing of record or on file in that Department until after the entry.

Now the plaintiff contends that conceding that there was a sale and that thereby the plaintiff relinquished the right of entry which he had acquired by his settlement, yet thereafter without having abandoned the possession he filed his application in the land office; that that application must be considered as an entirely new proceeding initiated by one in actual possession, desiring to take the land as a homestead, and that it is error, and error of law, to adjudge it vitiated or affected by the prior sale.

Conceding that the effect of a sale prior to the application projects into the case a question of law, we are still of opinion that the decision of the Secretary was right, and that the award of the patent to Mrs. Flahive must be sustained. A sale made by a party who is in possession of a tract of public land with an intent thereafter to enter it as a homestead is equivalent to a relinquishment of his right to enter, and the Department may properly treat him as having no further claims upon the land. He may

not sell and still have the rights of one who has not sold. He does not by merely continuing in possession create a new right of entry as against the party in whose favor he has relinquished his right.

We are of opinion, therefore, that the sale in 1883 was rightfully held by the Department to estop the plaintiff from subsequent entry of the land, at least as against one who was a purchaser from his vendee.

The petition for rehearing is

Denied.

True copy.

Test:

Clerk Supreme Court, U. S.